TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 58.

THE STANDARD OIL COMPANY, PETITIONER,

vs.

EDWARD ANDERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 5, 1907.
CERTIORARI AND RETURN FILED APRIL 20, 1907.

(20,656.)

(20,656.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 275.

THE STANDARD OIL COMPANY, PETITIONER,

vs.

EDWARD ANDERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

THE STANDARD OIL COMPANY, Plaintiff in Error (Defendant Below),
vs.
EDWARD ANDERSON, Defendant in Error (Plaintiff Below).

Transcript of Record.

Error to the Circuit Court of the United States for The Eastern District of New York.

Printed under the direction of the clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Sep. 20, 1906. William Parkin, Clerk.

1 United States Circuit Court for the Eastern District of New York. At Law.

EDWARD ANDERSON, Plaintiff,
against
STANDARD OIL COMPANY, Defendant.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice
2 of the United States, at the Borough of Brooklyn, this twenty-first day of October, in the year one thousand nine hundred and four.

[L. S.] B. LINCOLN BENEDICT, *Clerk.*

HOVER & PETTIGREW,
Plaintiff's Attorneys.

Office and Post Office address, 94 Liberty St., Borough of Manhattan, New York City, New York.

(Endorsed:) United States Circuit Court, Eastern District of New York.—Edward Anderson, Plaintiff, *vs.* Standard Oil Company, Defendant.—Summons.—Hover & Pettigrew, Plaintiff's Attorneys. —To the Defendant within named. Take notice, that upon default judgment will be taken for the sum of $5,000.00 Dollars, in money, besides costs. Hover & Pettigrew, Plaintiff's Attorneys.—Filed October 24, 1904.

Circuit Court of the United States for the Eastern District of New York. At Law.

EDWARD ANDERSON, Plaintiff,
against
STANDARD OIL COMPANY, Defendant.

Plaintiff's Complaint.

Edward Anderson, of Brooklyn, State of New York, who is a citizen of said State of New York and of the United States,
3 and an inhabitant of the Eastern District of New York aforesaid, plaintiff in this suit, by Hover & Pettigrew, his attorneys, complains of the Standard Oil Company, a corporation organized and existing under the laws of the State of New Jersey, and a citizen of said State of New Jersey, and says:

I. That on or about the 16th day of September, 1904, the plaintiff was employed as a longshoreman by one Torrence, a master stevedore, and was engaged in loading the ship *Susquehanna* with oil at the defendant's dock at Bayonne, New Jersey; that the said Torrence was then and there engaged in loading the said ship under a contract with its owners, and that the said plaintiff was rightfully on said ship and was working then and there under the direction of the said stevedore.

II. That at the time of the injuries herein complained of, plaintiff was working as aforesaid in the hold of said ship taking away from beneath the hatchway and storing in said hold boxes of oil, as the said boxes were lowered down the hatchway into the said hold; that the defendant through its agents and servants was then and there engaged in taking the boxes of oil from said pier, and lowering the same into the said hold by means of a steam winch owned and operated by the said defendant, its agents and servants; that it was the duty of the agent or servant of the said defendant operating the said steam winch to lower the said boxes of oil into the said hold only at the command or direction of the gang man, employed by the said stevedore, but at the time of the injuries herein complained of, the agent or servant of the said defendant operating the said winch had raised a load of the said boxes of oil by means of the said winch over the hatchway of the said ship, and the said agent or servant of the said defendant thereupon without the order or direction of the said gang man, negligently and carelessly, and in violation of
4 his said duty, and without any warning to the plaintiff, set the said winch in motion and lowered the said load of oil into the hold of said ship with great force and violence.

III. That solely by reason of the negligence of the said defendant, its agents and servants, in lowering said load of oil into said hold without waiting for the direction of the said gang man, and without fault or negligence on the part of the said plaintiff, said load of oil struck said plaintiff in the face, knocking the plaintiff down, fracturing his nose, cutting his upper lip, and bruising his face and forehead, and that solely by reason of defendant's negligence as afore-

said the forehead, nose, lip and face of said plaintiff were seriously and permanently injured, and his body otherwise bruised and injured, from which injuries he became and continues to be sick, sore, maimed and disordered, and suffered and still suffers great pain and distress, and has ever since been and will for a long time to come be wholly incapacitated and prevented from laboring, and has necessarily expended large sums of money in endeavoring to be cured of his said injuries, to the plaintiff's damage five thousand dollars ($5,000).

Wherefore, the plaintiff demands judgment against the defendant for the sum of five thousand dollars ($5,000), together with the costs of this action.

HOVER & PETTIGREW,
Attorneys for Plaintiff,
94 *Liberty Street, Bor. Manhattan, New York, N. Y.*

STATE OF NEW YORK, *County of Kings, ss:*

Edward Anderson, being duly sworn, deposes and says:
5 That he is the plaintiff in the above entitled action, and that he has read the foregoing complaint and knows the contents thereof; that the same is true of his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDWARD ANDERSON.

Sworn to before me this 18th day of October, 1904.

——— ———.

(Endorsed:) Plaintiff's Complaint.—Filed October 21, 1904.

The Circuit Court of the United States for the Eastern District of New York. At Law.

EDWARD ANDERSON, Plaintiff,
against
STANDARD OIL COMPANY, Defendant.

Defendant's Answer.

The defendant, by Charles W. Fuller, its attorney, answering the complaint in the above action.

1. Admits that the defendant is a corporation organized and existing under the laws of the State of New Jersey, and a citizen of said State of New Jersey.

2. Says that it has no knowledge or information sufficient
6 to form a belief as to the truth of the remaining allegations set forth in the complaint, and therefore denies the same.

Wherefore, the defendant demands judgment dismissing the complaint, with costs.

CHARLES W. FULLER,
Defendant's Attorney, 206 Broadway,
Borough of Manhattan, New York City, New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Charles T. White, being duly sworn, deposes and says: That he is an officer of the defendant corporation, to wit, its assistant secretary; that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

CHARLES T. WHITE.

Sworn and subscribed to before me this 7th day of November, A. D. 1904.

A. T. DOREMUS,
Notary Public, Richmond County.

Certificate filed in New York County.

(Endorsed:) Defendant's Answer.—Filed November 11, 1904.

7 March 2, 1906, Stated Term.

Present: Hon. Edward B. Thomas, District Judge holding the Court.

EDWARD ANDERSON
vs.
STANDARD OIL COMPANY.

Trial ordered.

Appearances.

Hover & Pettigrew, for Plaintiff.
Charles W. Fuller, for Defendant.

Jury drawn as follows:

* * * * * * *

Jury sworn.
Trial suspended to March 5, 1906.

Stated Term, March 5, 1906.

Trial resumed. Same appearances.
Mr. Pettigrew addresses jury for plaintiff.

EDWARD ANDERSON, called as a witness in his own behalf and sworn. Examined by Mr. Pettigrew. Cross examined by Mr. Fuller.

FRANK B. HOLFEL, called as a witness for the plaintiff and sworn. Examined by Mr. Pettigrew. Cross-examined by Mr. Fuller.

8 JOHN ANDERSON, called as a witness for the plaintiff and sworn. Examined by Mr. Pettigrew. Cross-examined by Mr. Fuller.

CHRIS. F. TERENCE, called as a witness for the plaintiff and sworn. Examined by Mr. Pettigrew. Cross-examined by Mr. Fuller.

THOS. CONNELL, called as a witness for the plaintiff and sworn. Examined by Mr. Pettigrew. Cross-examined by Mr. Fuller.

WILLIAM ANDERSON, called as a witness for the plaintiff and sworn. Examined by Mr. Pettigrew. Not cross-examined.

[Plaintiff rests.]

Mr. Fuller moves to dismiss. Motion denied.
Mr. Fuller addresses jury for the defendant.

J. M. TIERNEY, called as a witness for the defendant and sworn. Examined by Mr. Fuller. Cross-examined by Mr. Pettigrew.

THOS. CONNOR, called as witness for the defendant and sworn. Examined by Mr. Fuller. Cross-examined by Mr. Pettigrew.

[Defendant rests.]

Testimony closed.
Mr. Fuller moves to direct verdict for the defendant.
Motion denied.
9 Mr. Fuller sums up for the defendant.
Mr. Pettigrew sums up for the plaintiff.
Judge charges jury.
Officers sworn.
Jury retires.
Jury returns.
Verdict for plaintiff for $1,500.
Motion to set aside verdict and for a new trial denied.
Stay of proceedings for 30 days after entry of judgment granted to make a case and settle bill of exception.

United States District Court, Eastern District of New York.

EDWARD ANDERSON, Plaintiff,
against
STANDARD OIL COMPANY, Defendant.

Judgment.

The issues of this action having been brought on for trial before the Hon. Edward B. Thomas, District Judge, and a jury, at a

Trial Term of this Court, held in and for the Eastern Dis-
10 trict of New York, at the United States Circuit Court Room, in the Post Office Building, in the Borough of Brooklyn, City and State of New York, on the 5th day of March, 1906, and the proof and testimony having been taken, the issues having been tried and a verdict rendered for the plaintiff for the sum of fifteen hundred dollars ($1,500) on the said 5th day of March, 1906, and the plaintiff's costs and disbursements having been duly adjusted at the sum of fifty-seven and 25/100 dollars ($57.25),

Now, on motion of Hover & Pettigrew, attorneys for the plaintiff, it is

Ordered, adjudged and decreed, that the said plaintiff, Edward Anderson, recover of the said defendant, Standard Oil Company, the sum of fifteen hundred dollars ($1,500) damages and fifty-seven and 25/100 dollars ($57.25) costs and disbursements; amounting in all to fifteen hundred and fifty-seven and 25/100 dollars ($1,557.25), and that the plaintiff have execution therefor.

Dated Brooklyn, N. Y., March 10, 1906.

By the Court,

B. LINCOLN BENEDICT, *Clerk.*

(Endorsed:) Judgment filed and entered March 10, 1906.

11 In the Circuit Court of the United States for the Eastern District of New York.

EDWARD ANDERSON, Plaintiff,
vs.
STANDARD OIL COMPANY, Defendant.

Bill of Exceptions.

This cause came on for a hearing before the Hon. Edward B. Thomas, Judge, and a jury, on the fifth day of March, 1906; present, Messrs. Hover & Pettigrew (Mr. Pettigrew), attorneys for plaintiff, and Charles W. Fuller, Esq., attorney for defendant, when the following proceedings were had, to wit:

EDWARD ANDENSON, being duly sworn and examined as a witness on his own behalf, testifies as follows:

By Mr. PETTIGREW:

I am the plaintiff in this action and reside at 154 Twenty-eight-street, and am a citizen of the State of New York. On September 16, 1904, at Constable Hook, New Jersey, I was in the employ of Stevedore Chris Terence, stowing cases in the hold of a ship, taking my own draft; there were eight men in the hold, eight trucks, each man going out after his own draft, and of course my turn came. I heard the gangman blowing the whistle to go ahead, and
12 of course I was standing waiting for the whistle to come back; I was standing looking down, of course; I was quite

a little time in the business; I was waiting for the whistle to blow, but didn't hear any and I thought it was mighty long between whistles, so I throwed my head up to look what was the matter, and as I throwed my head up I seen a shadow or something; and that is all I know about it, because then I was knocked down.

I think the ship was the *Susquehanna*. I was standing on the starboard side, or what they call in shore, towards the dock, when I was hit by this draft. We have a signal of whistles to come back, the gangman's whistle—the man on top tending to the gangway—he has the whistle. Eight men were working in the hold. The nearest man around the hatch was a man by the name of Tom Connell; he was as near as six or seven feet; as near as it was necessary to come; I couldn't judge the distance; I may be a foot out of the way, but as near as six or seven feet. I was standing about a foot, or a foot and a half, from the combings, the combings of the hatch, on the starboard side. I should judge the platform was brought out from two to three feet over the combings, and I was standing about a foot and a half from the combings. This platform projected two or three feet over the starboard side.

The first time I started as longshoreman was in '86; I was three years away from it; except for the three years I have been working at it all the time ever since. The winchman knows when to hoist by the gangman's whistle; the gangman blows to go ahead—blows one whistle to go ahead. My truck was on the port side on the offshore, and this draft of oil, ordinarily, would have come down about in the middle of the hatch, and a little—I got it on my truck by shoving it over a little bit. That is the general place to stand on the inshore side of the draft.

I heard a whistle before this draft of oil came down; I
13 couldn't judge how long; it wouldn't be more than maybe ten seconds. That whistle was for to go ahead—to hoist. I did not hear any whistle after that. My next recollection was I was standing up, and I asked one of my friends, I says: "Am I hit much? Is my nose gone?" I said. I ran up on the deck. I went down in the cabin, and the ship's keeper, or the captain, or the mate, whoever it was, said that he would—then this stevedore's brother was there—I don't know his name, the first name. He went to the hospital with me, Bayonne Hospital. My nose was broken and my lip was cut, my teeth was loose, and all that wasn't so much as the neck; that was worse; the back of the neck was sore. They sewed it up, and they asked me if I was able to go home, and I said, "I think so."

I didn't go home. When I came to Brooklyn I was so plugged up with blood and so choked I had to go to the doctor and get relief—Dr. Hoefle. He took the bandages off, and he said they made a fool job of it, so he took three or four stitches in the lip. I got the scar on my forehead from the same accident.

The doctor visited me after that, twice. I visited him for about four weeks; he treated me that length of time. It was about five weeks before I went to work. I was not able to work so I had what they call "second foreman's job" with a friend of mine, looking after

a gang of men. I was receiving forty-five cents an hour at the time the accident happened. I worked eight hours down there a day. My wages averaged from twenty to twenty-five dollars a week. I averaged about twenty dollars the year around. I am not following up the oil work; I am working more general cargo work now; that is stevedore work as well. It was over six months before I was able to do my regular work, and even yet I can feel it in the back of my neck; if I get a sudden twist or so, I am done for, for a day or a week. It interfered with my going to work because it hurt me in back of my neck; stiff; couldn't bend my head. The pres-
14 ent shape of my nose is due to the injury. My nose, before the accident, before I ever was hurt, had a little twist towards the right; it someway grew that way. The lip was cut. I can't breathe through one nostril; it is all plugged up almost all the time; I can't breathe through it. Before the accident it had a kind of an incline towards the right; never had been injured in any way; nothing unnatural about it. The trouble now is I can't breathe; one of my nostrils is plugged up; I can't breathe through it freely. In the present condition of my nose, the only fault I find in it, is one of the nostrils; I can't breathe through it freely. The nose is flatter than it was before, and it is turned over towards the left side. It was straight before, except there seemed to be an incline towards the right—the end of it. I think it would be noticeable, as long as I noticed it, other parties noticed it as well.

We were filling up the lower hold. I was on the lower hold. The vessel had another deck between that and the top of the hatchway—between-decks. As I stood there I should judge I came between five and six feet from it. I should judge it was somewhere around eighteen or twenty feet up to the staging on deck.

Cross-examination by Mr. FULLER:

I have been working as a stevedore since '86 when I started. I often helped load vessels down at Constable Hook. This loading is done with great rapidity; it does come very fast at times. There were eight men down in the lower hold stowing away. I think it was two decks in the *Susquehanna*. I was working down in the hold. The draft that came before the one that struck me was an inshore draft. It is a fact that those drafts come down in the hold and are landed on a truck, one inshore and then one offshore, and the gangwayman is the man who regulates the swing of the draft, whether it
15 is inshore or offshore. The draft before this had come down inshore and I expected that the draft that was coming down was offshore. That was my draft. My place was right inshore in a straight position for to land the draft. If I would be on the offshore side I would be in no position to land my draft. I judge the hatch on the *Susquehanna* was, I should say, from 12 to 10 feet wide. I think it was longer in length. Between the inshore side of the hatchway, the opening and the side of the vessel, from the hatch combing to the sides, that must have been at least from 18 to 20 feet; it is a pretty wide ship. We had cases in the bottom floor under

the combing of the hatch. The space open was, I should say, from five feet high towards the wing. There was plenty of space for me to have stood under that when this accident happened.

I think I knew a man named Connors. This man who was working down there with me at the time, the man standing nearest the hatch, was Connell.

There were loaded there, maybe 1,200 cases an hour, or something like that.

I was laid up about five weeks, a couple of days over, or a couple of days less; I couldn't tell exactly. I went to work as second foreman after that. I was getting fifty cents an hour, getting more than I got down at the Hook, so my actual loss was five weeks' time.

I know the gangwayman; his name is John Anderson. No relation of mine.

If I had known the draft would come down as it did, I wouldn't be there at all.

Redirect examination by Mr. PETTIGREW:

At this place where I was standing, the inshore draft came further inshore than ordinarily; because the draft came on a swing, it knocked me down; it would have smashed me if it had come down straight as usual, but it came with a swing. An inshore
16 draft would not have hit me if it had come down in the regular way, where I was standing. It wouldn't swing in as much as that.

When I stated my actual loss was only five weeks, I meant that I was idle that time; I wasn't able to go out. After that I only worked a week and a half with that friend of mine; then I was idle again for a week or two weeks because I wasn't able to do my work. After this second week or two of idleness I wasn't able to do my work; I had to take an old man's place. I had to take five cents less an hour—forty cents an hour. That continued about six months and I was able to stow the cases; I didn't have the strength in the back of my neck. After seven months I became foreman; took charge of loading ships.

Recross-examination by Mr. FULLER:

I can work every day when I get work.

I am not all right now. Now when I am working I get five dollars a day when I have charge of a ship; I get fifty cents an hour when I am second foreman; I get forty-five cents an hour when I am stowing cargo, or forty cents at general cargo when I am working. I always got forty-five cents before the accident, and five dollars when I had charge of a ship.

FRANK B. HOEFLE, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

By Mr. PETTIGREW:

I am and have been a practicing physician in the Borough of Brooklyn for ten years. I am connected with the Norwegian Hospital; that is about all just at the present time.

I know the plaintiff in this case, Edward Anderson. I have been the family physician for about seven years. I was consulted
17 by him on the 16th of September, 1904. I made an examination of him then. I found him suffering from negative fracture of the nasal bones. I found him suffering from a penetrated wound complete of the upper lip, completely penetratitng the upper lip, lacerated completely. I also found him suffering from sprained muscles, and also ligaments of the spinal column, and contusions all about the face. He was completely enwrapped in bandages when I saw him after coming from the hospital. He was also suffering from severe shock.

I saw him steady right along for two weeks until he was discharged by me; until sufficiently well to go back to business. I saw him for about five weeks, off and on. I am not positive how many calls he made on me; I have no recollection just at the present time, but he came as often as it was necessary; at the beginning he came every day. For the first two weeks I saw him steady every day. My services were worth from $40 to $50.

I have had ten years' experience in the treatment of injuries like this the plaintiff had. I found strained muscles and strained ligaments of the vertebræ, also. The progress of those conditions from the time I saw him up to the present time has been very slow. The plaintiff has an abnormal nose; the left nostril is completely obliterated by the fracture being sent over the vomer so it completely excludes the air passage in the left nostril. The right nostril is practically free, a little freer than it was before, but the left nostril is completely obliterated by the vomer bone. I made that examination about four days ago.

Cross-examination by Mr. FULLER:

I judge his nose was in good condition before the accident; he never complained. I put it in position as well as I could. He can tell best that he can breathe better; I am only saying from my examination the vomer, which is the bone dividing the nasal
18 cavity—I should judge that the conclusion was pretty conclusive if he says he can breathe through that nostril. The fact that that was completely closed would cause him to be suffering from catarrhal conditions and increase the hypertrophy or swelling of the mucous membranes.

JOHN ANDERSON, being duly sworn and examined as a witness for the plaintiff, testifies as follows;

By Mr. PETTIGREW:

My occupation is working alongshore, sir. I have been so engaged about twenty-six years. I know the plaintiff, Edward Anderson. I have known him, as near as I can guess, ten or fifteen years. On the 16th of September, 1904, I was working for Terence. I was taking in the oil off the docks. I walked forward and backward on the deck—on the stage, what we call it—taking in the oil, and the rope to take the oil in with, went into a hook that way (indicating), and held on very light through the hook, and when I came right on the edge of the stage, the driver came back with the whistle. We go by the whistle all the time in the work.

They called me the "gangman." I was supposed to take in the cargo that came to the ship where we were working—to take in the cargo out of the dock and put it in the ship's hold. The winchman knows when he hoists. I always blow the whistle, blow for him to start. That is a whistle anybody can hear five city blocks.

I was going to hold the draft until I got the rope clear. I hold the draft with the check rope. You got to hold the check rope with your hand, one end in your hand, the other is fast, it goes through a strap; with that I hold on the draft that comes in on the stage; that goes down in the hold. I guide the draft right for the main hatch, where they are working over the middle. I then go to check it. I was going to hold the draft, and he came back—
19 we whistle to go ahead and to come back. When I get the draft of oil over the hatchway, I always whistle for them to lower, if the draft is right; if it isn't right, I hold it back on the stage, back it back on the stage, and straighten it up. It is the winchman's duty to wait until I blow that whistle for them to lower; that is the practice. He has got no business to come back or go ahead until I blow the whistle.

How this particular draft of oil hit the plaintiff I can tell in one breath. The way they were, as I told once before, that rope was too big, and caught in the hook that way, and it slided gradually along on the stage; I was going to catch it, but when they came clear of the stage the driver dropped it right down, and, of course, the rope pulled it right in, and he was going to grab the draft, and it struck him right here (indicating). That is how it happened. The rope catching in the hook swung that draft further inshore; that swung it right hard in on the hatch combing; that draft is supposed to go over there, and, on account of the rope hanging to the hook, it swung it in.

Before blowing the whistle it was my intention to loose that from the hook. No one except me gives any direction to this winchman; I am the only one. Mr. Terence hired me. I blowed the whistle to go ahead, and he went ahead, but came back on his own idea. The only direction that I give is to blow the whistle for him to go ahead, that is all. I blow the whistle for him to hoist. I did not blow the whistle for him to lower. If everything is all right I blow the

whistle for him to lower. It is "toot-toot" all the time; it is "go ahead" and "come back, and "go ahead" and "come back."

That particular staging projected, I should judge, about a foot and a half, or two feet, as near as I can see to it, over the hatchway.

When I saw that the draft was going down without a whistle
20 I did not call out to those down below because I had no time.

The winchman from where he is can see this draft of oil sometimes. The winchman is guided in stopping; he knows when to stop that draft of oil by a mark on his fall, and he goes by that mark all the time. The winchman faces the draft most of the time, and in stopping he is guided by some mark on the fall and not my whistle. In stopping he goes by some mark on the fall; I don't have to whistle.

About as near as I would guess the winch is about fifty feet from the hatch. It was forward; I was working aft and the winch forward of it, as near as I can guess, 50 or 60 feet. The winch is located right on top of the roof, right on the shed of the dock. The winchman stands in a little underneath, on top of the roof. The winch isn't on the ship; it is on the dock; the driver has a little house on top of the shed and can stand and look down.

Cross-examination by Mr. FULLER:

I have been working as stevedore 25 or 30 years, down at the Hook; worked down the Hook since the docks first came up there—Constable Hook.

These cases are loaded with great rapidity; they run eight cases all the time in a sling; there are supposed to be, but sometimes one leaks and they take it out. They run on a truck to the side of the boat, and at that moment the stevedore's men take charge of them, and the stevedore's men place hooks in the sling and I give the signal for the winchman to hoist and it comes up the side of the boat and swings over the hatch.

On the day of this accident they were working in the lower hold and we just commenced to load the after hatch. There was a deck on which I stood, with a stage over it, and then there was another deck below that, and then a third deck down in the hold. These sling loads are dropped down just to the mark so they can run the truck under it and take it away.

21 On this particular sling that caused this accident, it was a fact that because my rope became entangled it went inshore instead of offshore, and the cause of the accident was the tangling of my guy rope, or check rope, and dropping that sling inshore instead of letting it go offshore.

Anderson was working for Chris Terence.

Q. Did you see a man named Connell there that day?

A. No; Connors, he used to be there, but I didn't see him that day there; he used to be around the dock; I know him from a young man; I didn't see him; there was nobody there but the boy who hauled slings for me.

There is Connell and Connors, one belonged to the Standard Oil

Company, and Connors worked for the stevedore. Connors was down in the hold.

These cases came up over the side of the vessel, and then they swung over the hatch and I blew a whistle for them to go down. I don't think it would take a minute from the time they get out of the dock until they have them in the hold. I was not down in the hold of the vessel right after this accident. I was not down there before.

There might be one stanchion in some ships right in the middle; there might be stanchions as big as my wrist, but there is plenty of room on either side of the opening under the hatch, for a man to stand.

Redirect examination by Mr. PETTIGREW:

That draft ought to fall sixteen feet inshore; it swung in all of three feet inshore. I know that because when a man working offshore and inshore—I ought to know because a lot of drafts swing over that way when the man is offshore, and when the man works inshore I hold the draft inshore to him; the hatch can't be over six feet wide anyway.

This draft of oil did not hit anything down there besides the plaintiff; that draft was stopped when they came to the mark there.

22 There wouldn't have been any accident if it hadn't been lowered without the signal; there wouldn't have been any accident if the rope hadn't been wet.

CHRISTOPHER F. TERENCE, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

By Mr. PETTIGREW:

My occupation is stevedore. I was the contracting stevedore for the loading of this ship, the *Susquehanna,* when Edward Anderson was injured.

It was the customary thing to pay a dollar and a half a thousand for hoisting; they send you a bill and you send them a check. That is all the arrangement I ever had. I conformed to the custom in this case and paid the Standard Oil Company $1.50 a thousand for hoisting. I did not pay that winchman nor hire him. I know them by sight; I don't know any of them by name. I never hire any winchmen. I never had any occasion to discharge him; I wasn't his boss; I could not discharge him. I suppose you could complain to the Standard Oil Company and have him removed if he didn't suit you. I never done it, so I don't know.

By the COURT:

Q. You mean to say you couldn't have had that winchman removed if he wasn't a satisfactory winchman?

A. I don't know anybody that did so; I don't know.

By Mr. PETTIGREW:

Q. Could you remove him?

A. I couldn't remove him; I could complain of him; I don't know whether he would be removed.

Q. What authority over him did you have as contracting stevedore?

A. My foreman had charge; I never had——

Q. He represents you?

A. Yes.

Q. What could he do?

23 A. The foreman could complain to me if he didn't suit him and I could complain to the Standard Oil Company.

Q. What else could you do; what could you direct him?

A. To get along the best he could with him; that's all.

Q. Could you direct him to go faster or work harder?

A. That was all to the foreman.

Q. Could the foreman do that?

By the COURT:

Q. Under whose immediate orders was he for the purpose of carrying out the work?

A. The foreman's; I have been very little there.

By Mr. PETTIGREW:

Q. These drums and the winch were stationary on the dock, were they?

A. Yes, sir.

Q. And the Standard Oil Company owned the dock and the drum and the winch?

A. That is what we always understood.

Q. Did you ever try to direct the winchman to move faster or to move more slowly, or any other way than simply to direct him when to start, when to hoist?

A. I never did.

Cross-examination by Mr. FULLER:

I have not with me the bill I received for the hoisting of these cases. The foreman regulates the hours of the longshoreman.

Q. And the winchman is obliged to stay there as long as you are hoisting?

A. I never heard different; they always stay as long as the men stay.

I regulate the winchman's hours in that way; when they stop the winchman stops. The winchman is absolutely under my control through the foreman, in starting and stopping, and as to the hours, he turns to when they do, and stops when they do. If this winchman had proved incompetent and had been reported to me, I

24 would have reported to the Standard Oil Company. I was there at the time of the *Susquehanna's* loading—not at all on the day of the accident; I heard it next day.

The tackle for the hoisting is entirely rigged by my employees, foreman and gangwayman, they usually get things ready. The only thing furnished by the company is the winchman and the drum. The rigging of the tackle and the guy rope and the hoisting rope that is taken up to the drum and is wound around the drum in

the course of the hoisting, is furnished by me or the ship, whichever the contract calls for.

Q. The company has absolutely nothing to do with——

A. They furnish the winch and the winchman.

The rigging of this guy rope, that is done by the gangwayman; he generally looks after the guy rope. I do not have a written contract; not exactly. I work for Sewell & Company, a mutual agreement year in and year out.

Redirect examination by Mr. PETTIGREW:

When I speak of having charge of this winchman in starting and stopping, I mean, if they turn to at eight o'clock, he goes to work with them; and if they quit at half-past four, of course he has nothing more to do when they stop.

WILLIAM CONNELL, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

By Mr. PETTIGREW:

My occupation is laborer—longshoreman. I was working with Edward Anderson when he received this injury, within three and a half feet of him, in the hold. He was standing right alongside of me; I was on the left side of him because my truck was the next coming. The inshore part of the hatchway. He was standing
25 within the combing, one foot and a half inside the staging overhead. It might be a foot inside; I wouldn't be sure whether it was six inches more. Two of us standing like that (indicating); he was at my right-hand side. When the load comes over the fall he is supposed to run his truck offshore and I was supposed to take the next and run it inshore. He was standing underneath the stage, underneath, but we stood side by side.

The ship had two decks, so far as I know; that is, the lower hold and the between-decks. We were working about five feet and a half from the next deck above me; there was the between-decks overhead of us. It was, up to the between-decks, about six feet. As I stood there, from the top of my head to the next deck above me, it was a little above my head, it was higher than my head; I couldn't say whether it was a foot higher. The hatchway, that between-decks, has a combing. The stage is out about two and one-half feet outside of the hold, and you have to stand inside that about a foot anyhow, to stand by to land your draft a foot and a half, or a foot and six inches; when the draft comes down on the fall you have to be there to land it off-shore.

This man, Edward Anderson, was standing on the right-hand side of me; he was out ahead of me; he had to land the draft ahead of me. There was four men forward and aft, eight men in the hold of the ship. We had eight trucks and this man was running a truck on the opposite side to me, and when he landed his draft I had to land mine after him, next to him; and I come out in a hurry because we haven't much time to spare, and I stood by the draft that was coming down, and I stood by with my hands down.

Neither of us had a word to say because we were busy enough, and the draft—we didn't see no draft coming. I never seen the draft; it came without no warning whatsoever; the whistle was
26 never blown, to my knowledge; and the draft came down and hit the man straight in the face, right here and right here (indicating), and threw him about five feet back on the floor, on his back, inside, on top of the cases. I thought the man was killed; picked him up and sat him down on the cases, you know; sat him up on the cases and went for one of the men that was forward, to give me a hand, and put two cases against his back. For about four minutes he was unconscious, and he opened his mouth and said:"What happened?" And he says: "I think my nose is broke." He was all blood, so far as I saw his features, and every bit of his underclothes were all blood, and his lip was hanging down and I could see the red gums with the white teeth, and he says: "Is my nose broke?" and put up his hands.

Q. Were you where you could have heard the whistle if it had blown?

A. I was within three and a half feet of the man.

Q. How are you ordinarily warned that the draft is coming down?

A. They were just waiting for the whistle to blow.

By the COURT:

Q. How do you ordinarily know it?

A. It comes down so quick, you know.

Q. Any other draft?

A. By blowing the whistle.

By Mr. PETTIGREW:

Q. If this draft had come down as it usually did come down, would it have hit Anderson where he was standing?

A. No, sir; if the whistle was blown it would never have touched him.

Cross-examination by Mr. FULLER:

I was standing right along-side of Anderson, within three and a half feet; not as far aft as he was standing; in the same position. He was in the middle; it was his first place to land the draft;
27 mine the second. This draft that was coming down was Anderson's draft. The draft is supposed to come down to a mark, and he had to stand in-shore so the draft would land on his truck. This draft did not stop at the mark when it came down; it came down like a slap and hit him right in the face. The draft comes down as far as that before you land it, as far as the middle of your waist; then you have the pressure up against it, and it came down and hit him right in the nose.

The draft stopped at its usual place; then after that it would be put in a truck ordinarily. My draft was the inshore draft. His draft was the offshore draft. When this hit him it knocked him about five feet, so there was five feet of space behind him, the wing of the ship. This draft came down inshore of him, about that

much away from him (indicating). It came straight down and hit him right in the face before he had any notion there was the draft coming down, because there was no whistle blown. I was pretty near as near as he. That is blown,—one to go ahead, and two to come back; that is for the winchman. We haven't anything to do with that.

Redirect examination by Mr. PETTIGREW:

This draft of oil came down straight inshore and swung in about a foot, and hit this man. It swung inshore.

WILLIAM ANDERSON, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

By Mr. PETTIGREW:

My occupation is pulling up slings and throwing them on the dock. On the day of this accident to Edward Anderson I was working for the stevedore, Mr. Terence. I was there when Anderson was injured. I was hauling up slings, and was right be-
28 side the gangway there, standing on the staging on the deck. By hauling up slings I mean the ropes the cases go in when they hoist them up. I haul them back again up on deck. I didn't hear the whistle blown and I thought there was something the matter. I did not notice that draft of oil before it went down. I didn't see it before it went down. I was out on the deck throwing the rope on the dock when that accident happened. I did not hear the whistle. I seen the guy rope was caught in the hook. I did not see the draft of oil after it went down, nor the course it took.

No cross-examination.

[Plaintiff rests.]

Mr. FULLER: I ask for a nonsuit in this case on the ground that there has been no negligence proven here on the defendant company; on the ground that this man is a fellow-servant.

Second. That there has been no proof of any negligence on the part of the company, and

Third. If there were negligence on the part of this winchman, that there was also negligence on the part of a fellow-servant, and your Honor knows it is part of the duty of the plaintiff to make out all the circumstances necessary to recover.

The COURT: I deny the motion. I think the case is a case for the jury; these questions you have raised are questions of law.

Exception.

Mr. FULLER: On the further ground that the evidence clearly shows that this plaintiff contributed to this accident himself, by his own negligence.

29 The COURT: Those are questions for the jury.

Mr. FULLER: Objected to.

Exception.

Mr. Fuller opens the defendant's case to the jury.

JAMES M. TIERNEY, being duly sworn and examined as a witness for the defendant, testifies as follows:

By Mr. FULLER:

I live at 93 Pioneer, Brooklyn; my business is longshoreman at the present time. I was working on the 16th of September, 1904, for the Standard Oil Company, on the west side of Pier 3, on the *Susquehanna*. hoisting case oil. I remember the accident to Anderson. I was standing up in the drum house on the top of the shed. I was the winchman. I got the whistle to go ahead with the draft; one whistle goes ahead, the second whistle comes back. The check rope happened to catch in the hook; it was rather too large and the check rope happened to catch in the hook, and I got the whistle to come back, and I came back and the draft of oil went down to the mark. It went down the same as any other draft, and the gangwayman gave me the whistle to lower it. I stopped at the mark. I knew Anderson was hurt right after the draft swung inshore; one draft goes off center, and the other in center, and when the draft supposed to go off center comes in center, of course I know there is something wrong, provided he holds up for a minute. He held up for a minute and started to work previously afterwards. I got the signal to lower at that time and I lowered.

Cross-examination by Mr. PETTIGREW:

I didn't see this accident. I happened to be there running the winch. I couldn't see. That draft certainly went down in the centre and swung inshore through the check rope catching in the hook, that isn't calculated.

The house where I was standing is about sixty yards away; I was facing the draft; the only vessel working that day was the *Susquehanna*. In the course of my duties there I went according to the whistles. I ran the winch with two levers, one upright and the other horizontal,—the brake. When you get the first whistle you go ahead with the upright lever, and when you are over the stage two or three feet, whichever your mark is, stop and place on your brake; then you wait for a second whistle. He only blows one whistle, the same. You get the whistle come back, and you get one whistle to lower on the truck after you go to your mark. I am guided in stopping by my marks. I have a mark on the fall on the side of the vessel, or a mark any place convenient to see. I saw the sling itself as it hung over the hatch; it went down in the centre of the hatch. I saw this check rope caught in the hook before I lowered it; I saw it was caught fast there in the hook, and I lowered, knowing it was caught fast in the hook. It was only just in between the hook. You take a large check rope, two and a half inch rope, and if it is in between the hook it isn't catched; only just marked. It wasn't caught fast. That takes two or three turns after the gangwayman takes hold; if he blows the whistle and I go back with the draft it is liable to catch in the hook and swing the

draft inshore. It is not a common thing for that check rope to get caught in that hook. We lower according to the whistle. When the check rope is caught in the hook I lower it when I get the whistle, anyway. When that draft of oil swings over to the hatchway, it ordinarily is let down immediately upon its reaching that point. The gangwayman takes it inshore and offshore; I have nothing to do with them if I am running the winch, other than care whether it goes inshore or offshore, so long as it goes down in the
31 hold of the vessel. When that swings over the centre of the hatchway, almost invariably that is lowered at once. There is no perceptible space of time when it swings over until it is lowered; it is done very quickly.

By the Court:

The only objection to lowering it when the check rope is caught, is that it may swing it in. That was the cause of the accident. This check rope is a guide rope; this guide rope is around forty feet long. It is just a plain rope; one end of it was made fast. Say here was the rigging across the block in the centre, and say here was the centre of the hatch (indicating); one end was made fast here, to the rigging; a rope they had leading down from one of the yards down straight and made fast on the bottom round. The guide was made fast to the rigging,—one of the plain pins. The gangwayman holds the rope ready for to catch the draft after blowing the whistle; just as soon as the draft goes over the centre, he lets go of his end and it lowers down. One end of the guide rope is made fast to some part of the rigging; that stays there all the while, and the other end is in the hands of the gangwayman and he throws it around the draft of cases. He only just holds it so he can let go one end and slip it off. In this case, in letting go it dragged down into the hook in the fall, and so it was in that position that it went down, and being too taut it pulled it over inshore in place of offshore.

By Mr. PETTIGREW:

I was in the winch-house with the levers running the winch. I looked down there from 60 yards and saw the rope was caught in the hook; I saw after I had lowered a ways; I didn't see it in the first place; after I had lowered a ways I saw the rope was caught but it didn't hold the draft; it went down to the mark; it wasn't
32 the first time it had caught. I saw it was caught but kept on lowering it.

About this whistle—I am very sure I heard that whistle. I live in the house with Mr. Connell, 93 Pioneer street. I have not discussed this matter with him. I have been there around seven months. After coming there I didn't say in discussion with him, I wasn't certain whether I heard this whistle. No, sir, I didn't; never said the words; no, sir

I have been out of the employ of the Standard Oil Company about nine months. I left to go with the *Virginia;* a cousin of mine got me on the *Virginia.* I wasn't discharged; I left myself, through my own accord.

THOMAS CONNORS, being duly sworn and examined as a witness for the defendant, testifies as follows:

By Mr. FULLER:

I live at 86 Moran street, Elizabethport. I am employed by the Bay Way Refining Company. It is a lubricating oil place. I worked for the Standard Oil Company in—September, 1904. I was a winchman and worked around as a laborer. I remember the accident to Anderson. At the time of the accident I was down in the hold. I was supposed to nail on any broken covers, boxes that get damaged in any way; fix them up; look out for leaks. I was eight or ten feet from Anderson when he was struck by this sling load of oil. I saw it when it came down. He was on the inshore side of the vessel at the time he was struck; from the between-decks combings he was probably two feet out under the hatch. I was not watching the drafts in particular that day. I know that this draft was intended to go offshore. It was Anderson's draft. He was under the open hatchway. He came to the truck and picked up his sling off the truck, his empty sling, and walked over and threw it on the sling the boy was pulling up; then wheeled around in position to land his
33 draft. The draft, as I thought, instead of being checked for offshore was checked inshore; consequently, when he was in the act of catching it to land it, he throwed his head up and the draft came down and caught him.

Cross-examination by Mr. PETTIGREW:

At the present time I am in the employ of the Bay Way Refining Company. Down there in the hold at the time of the accident I was repairing broken cases, any cases that got damaged, and looking out for leaks.

The COURT: You move for a direction of the verdict upon the same grounds upon which you asked for a nonsuit?

Mr. FULLER: Yes.

The COURT: I deny the motion and will give you an exception.

The Charge.

THOMAS, *J.*:

Gentlemen, this case illustrates the democracy and equality of the law. Here an apparently sober, respectable and industrious citizen brings a charge against a corporation whose prominence it would be idle for us to disclaim, and yet here these two parties stand exactly alike. Neither is entitled to more consideration than the other, and each is to be judged precisely as any other citizen would be, and it is your rather delicate and careful duty to see that they are made alike before you.

Now, the plaintiff charges the defendant with negligence whereby he says he was hurt. Negligence is a wrong; therefore the plaintiff is accusing this defendant of a wrong; and as you perhaps have heard me say before, where one man charges another with a wrong, it is his duty to make the accusation good, here as elsewhere. When one

man points to another and says "You have wronged me," it
34 is for him to prove it. That means that the burden of proof is upon the plaintiff to convince you that the defendant has committed a wrong and that the plaintiff has been injured thereby. That is called the burden of proof. So there must be a preponderance of evidence in favor of the plaintiff and against the defendant in order to establish that proposition.

Now, you find that in the loading of the ship there was a contract between the defendant and the stevedore, by which each party was to perform certain duties. The stevedore was to do all the work of loading and contribute all the men therefor, except that the defendant agreed to furnish the winchman and the winch itself. If the stevedore had agreed to furnish all the men, then this plaintiff would have been a fellow-servant of the winchman, but as the case stands, the winchman had one master, to wit, the Standard Oil Company, and the plaintiff had another, to wit, the stevedore; therefore the two men were not fellow-servants; therefore the act of the winchman was the act of the defendant. It doesn't make any difference what act he was performing. He was there representing the defendant, to perform this act, and if his act or omission was negligent, and the plaintiff was injured thereby, then that negligence would be the negligence of the defendant.

Now, the charge is that the defendant, through this winchman, started the winch without orders. You heard the evidence upon that subject. That would be the first thing for you to decide undoubtedly. Did the winchman send down the draft before he got the signal? He says he did not; that he got the signal. You have heard the evidence on the other side, of the plaintiff and the gangwayman and Conners and the boy who was on the dock, who said they did not hear the signal, and it is for you to say, not from the greater number of witnesses, but from the quality and credibility of the witnesses, what the fact was, whether the winchman did have the signal
35 or whether he did not. If he did have the signal, then the plaintiff cannot recover here, because the winchman was then carrying out his agreement to operate his winch in accordance with the signals which should be given by the stevedore's gangman. If you find that is so, that ends the case at once, but if you find that the winchman did lower the hoist, the draft, without signal, then you are next to consider whether that act was a negligent act.

Now, how are you going to determine whether it is negligent? Negligence is a lack of proper care, breach of a duty that one owes another under particular circumstances. Now, whether it was negligent for the winchman to start would depend upon this: Would a man of ordinary prudence—*ordinary* prudence, not extraordinary but ordinary prudence, standing in the place of the winchman, under the circumstances have done the act which he is charged with having done, namely, letting the draft go down without getting the whistle? If you say that that was the act of a man of ordinary prudence, and you wouldn't say that a man of ordinary prudence was negligent, you have no right to say this winchman was negligent. If you find it was not a negligent act, then, of course, the

plaintiff cannot recover; but if you find it was a negligent act, then the plaintiff may recover, provided he himself was free from contributory negligence. That is, did he do something that a man of ordinary prudence under the circumstances would not have done. I suppose, as I understand the charge, he stood too near the opening; he exposed himself in a way that a man of ordinary prudence, having the duty imposed upon him that this plaintiff had, such a man would not have exposed himself in that way.

The question is whether the plaintiff was prudent, whether he was guilty of negligence, and before you can find that he was guilty of negligence the evidence must preponderate to show, because in this case the defendant is charging the plaintiff with negligence.
36 He says, "You yourself were doing something, or neglecting to do something that duty required you to do, and you helped on the injury yourself." If you find that the plaintiff in any way, the slightest way, aided the injury, the accident, then he is guilty of contributory negligence and cannot recover. The burden of proof is upon the defendant to show that the plaintiff was guilty of contributory negligence, the rule being different in that regard in this Court from the rule which obtains in the State court.

If you find that the plaintiff was guilty of contributory negligence there can be no recovery whether the defendant was negligent or not. If you find that the defendant was negligent under the meaning as I have stated it, but that the plaintiff was free from contributory negligence, then the plaintiff is entitled to recover such damages as resulted from the injury.

The plaintiff states that he received several different injuries. First, that his nose was broken; and to that the physician testifies, and the claim of the plaintiff is that there is a difficulty in the nose now, and if there is such difficulty you have a right to give him damages for that. He also complains that the bone has been so turned that one of the passages, one of the nostrils, is obstructed most of the time, and the doctor says it seems to him it is so obstructed that he cannot breathe through that side. It is for you to determine: if that is so then he is entitled to compensation. He said his lip was cut and sewed up, but he makes no complaint of that beyond the fact that there is a scar, but for the cutting of the lip, or the sewing up, going through that operation, or the scarring, he is entitled to such compensation as would be practicable and reasonable to give, assuming that he is entitled to recover at all. He says that his neck was sore, and the doctor states that some of the muscles and ligaments in that part of the body were strained, and I
37 understood the plaintiff to say he suffered some pain on account of it, and he says that now when he gives a quick twist he feels sensation in there and has pain. He is entitled to recover for that pain, that condition, as one of the items of damage; that should be considered by you if you reach that point. There is no evidence that this injury to the neck is permanent, and you have no right to give damages for the future, on the theory that it is permanent. He also says that he has a scar on the forehead resulting from some injury received there.

He also says he was away five weeks, and that his average earnings as a longshoreman were twenty dollars a week. He also says, after working a week or so, for fifty cents an hour, which was more than he got before, a little, he was obliged to give up for two or three weeks longer, as I understand, so that in all he claims to have lost directly seven or eight weeks, at an average loss of twenty dollars a week. He also says that for six months thereafter, as I understand it, six months after the injury, after he went back to work again, having dropped off those two or three weeks, he made forty cents an hour, rather than forty-five cents an hour. If so, and you think that was a result of this injury, that his disabilities rendered him unable to earn forty-five cents an hour, and he was obliged to take forty cents, you have a right to give him that sum for the portion of the six months not covered by the other items. In other words, it would be about four months, I should say, that he would be entitled to recover for this loss of five cents an hour, if he is entitled to recover at all, figuring on eight hours a day.

Now, gentlemen, there is the case, and it is for you to say in your sound judgment, what is just the right thing between man and man, and be careful that it is compensation but that it is nothing more.

Mr. FULLER: I ask your Honor to charge that if negligence of gangwayman contributed even partially to the accident, plaintiff cannot recover.

38 The COURT: If you find that the accident happened from the fact that the gangwayman's rope or guy rope was around the draft, and threw it in, and that was what happened, and that the defendant's negligence did not contribute by the alleged lowering of the draft without the whistle, of course the plaintiff cannot recover. It all comes back to this, which you must find: that the accident would not have happened unless the defendant had lowered the draft without the whistle, and that such act is a negligent act, and, of course, you must find in addition that the plaintiff was free from contributory negligence.

Mr. PETTIGREW: I ask your Honor to limit your charge by qualifying it to the extent that the putting of the guy rope around the fall should be a negligent act.

The COURT: It wouldn't make any difference whether it was negligent or not. If the accident were caused by the guy rope rather than by the lowering of the draft by the negligent act of the winchman, then there ought to be no recovery here.

Mr. PETTIGREW: Will your Honor qualify that by the negligence——

The COURT: I don't think the negligence had anything to do with it. If one thing caused it and the defendant was not responsible for that thing, it wouldn't make any difference whether that thing was the negligent act of some one else or not. In the situation in which it was, was the defendant negligent in lowering that draft, and was he negligent because he lowered it without getting the whistle from the gangwayman?

Mr. PETTIGREW: I ask your Honor to charge that there is no evidence of contributory negligence on the part of the plaintiff.

The COURT: I couldn't do that, because you said in your summing up, if the jury found the plaintiff free from contributory negligence, there could be no recovery. You fully discussed that. It is simply a question for the jury to say whether the plaintiff,
39 so far as contributory negligence was concerned, did what a prudent man would have done under the circumstances. If a prudent man was down there what would he expect? Would he expect this to come down and hit him or should he have stood farther away? Those are considerations which fall to the jury and they will pass upon them.

Mr. FULLER: I except to that portion of the charge where you speak of the men not being fellow servants.

After hearing all the evidence, the argument of counsel and the charge of the Court, as hereinbefore duly set forth, the jury retired to consider their verdict, and returned their verdict in favor of plaintiff, assessing his damages at fifteen hundred dollars, whereupon defendant moved as follows:

Mr. FULLER: I make the usual motion that the verdict be set aside as against the weight of evidence; that the damages are excessive; and for a new trial

The COURT: I think that is a very fair verdict outside of the point of law, which, of course, does not obtain in this Court.

Motion denied. Exception.

Stay of judgment for thirty days granted, in which to prepare a case, which time was duly extended.

Thereupon defendant tenders this, containing all the evidence, as its bill of exceptions to the action of the Court in the various particulars therein set out, which is signed in open court, sealed and made a part of the record in this case, and ordered on file *nunc pro tunc* as of March 10, 1906.

This 11th day of May, 1906.

EDWARD B. THOMAS,
Trial Judge.

40 We hereby consent that the foregoing shall constitute and shall be signed and settled and ordered duly on file as the bill of exceptions herein *nunc pro tunc* as of March 10, 1906, and we certify and agree that the same contains all of the evidence in this case.

HOVER & PETTIGREW,
Plaintiff's Attorney-.
CHARLES W. FULLER,
Defendant's Attorneys.

(Endorsed:) Bill of Exceptions.—Filed May 11, 1906.

The Circuit Court of the United States for the Eastern District of New York. At Law.

EDWARD ANDERSON, Plaintiff,
vs.
THE STANDARD OIL COMPANY, Defendant.

Petition for Writ of Error.

And now comes the Standard Oil Company, defendant herein, and says: That on or about the tenth day of March, 1906, this Court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Ap-
41 peals for the Second Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

CHARLES W. FULLER,
Attorney for Defendant.

(Endorsed:) Petition for Writ of Error.—Filed May 11, 1906.

The Circuit Court of the United States for the Eastern District of New York.

EDWARD ANDERSON, Plaintiff,
vs.
THE STANDARD OIL COMPANY, Defendant.

The defendant in this action, in connection with his writ of error, makes the following assignment of errors which he avers occurred upon trial of the cause, to-wit:

I. The Court erred in denying the motion of defendant, The Standard Oil Company, for a nonsuit dismissing the complaint at the conclusion of the plaintiff's case.

II. The Court erred in denying defendant's motion for a direction of a verdict in favor of defendant at the conclusion of the whole case.

42 III. The Court erred in charging the jury as follows: "If the stevedore had agreed to furnish all the men, then this plaintiff would have been a fellow-servant of the winchman, but as the case stands, the winchman had one master, to wit: The Standard Oil Company: and the plaintiff had another, to wit: the stevedore; therefore the two men were not fellow servants; therefore the act of the winchman was the act of the defendant. It doesn't make any

difference what act he was performing. He was there representing the defendant, to perform this act, and if his act or omission was negligent, and the plaintiff was injured thereby, then that negligence would be the negligence of the defendant."

IV. The Court erred in denying defendant's motion that the verdict be set aside and a new trial granted.

Wherefore, defendant, The Standard Oil Company, prays that the judgment of the Circuit Court of the United States for the Eastern District of New York be reversed, and that said Circuit Court be directed to grant a new trial of the said cause.

CHARLES W. FULLER,
Attorney for Defendant.

(Endorsed:) Assignment of Errors.—Filed May 11, 1906.

43 United States Circuit Court, Eastern District of New York.

EDWARD ANDERSON, Plaintiff and Defendant in Error,
against
STANDARD OIL COMPANY, Defendant and Plaintiff in Error.

On the subjoined consent of the parties hereto, and on all the papers and proceedings herein, it is hereby

Ordered, that the annexed bond be, and the same hereby is, approved as to form and sufficiency, and in all respects, and that it be placed on file and shall operate as supersedeas bond herein.

(Signed) EDWARD B. THOMAS, *U. S. J.*

We hereby consent to the entry of the foregoing order.

HOVER & PETTIGREW,
Attorneys for Plaintiff.
CHARLES W. FULLER,
Attorney for Defendant.

44 United States Circuit Court, Eastern District of New York.

EDWARD ANDERSON, Plaintiff and Defendant in Error,
against
STANDARD OIL COMPANY, Defendant and Plaintiff in Error.

Know all Men by these Presents:

That the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 35 Wall street, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto the above named Edward Anderson in the sum of thirty-two hundred dollars ($3,200) to be paid to the said Edward Anderson; for the payment of which, well and truly to be made, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal, and dated this eleventh day of May, nineteen hundred and six.

Whereas, the above named Standard Oil Company intends to prosecute its appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Eastern District of New York;

45 Now, therefore, the condition of this obligation is such, that if the above named Standard Oil Company shall prosecute its said appeal to effect and answer all damages and costs if it fails to make its plea good, then this obligation to be void; otherwise the same to be and remain in full force and virtue.

Sealed and delivered, and taken and acknowledged this 11th day of May, 1906, before me.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By HUGH M. ALLWOOD, *Attorney in Fact.*

Attest:
JAMES R. KINGSLEY,
[SEAL.] *Attorney in Fact.*

STATE OF NEW YORK, *County of New York, ss:*

On the 11th day of May, in the year 1906, before me personally came James R. Kingsley, to me known, who, being by me duly sworn, did depose and say: That he resided in the City of New York; that he is the attorney in fact of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said James R. Kingsley further said that he was acquainted with Hugh M. Allwood, and knew him to be the attorney in fact of said company; that the signature of the said Hugh M. Allwood, subscribed to the within instrument, was in the genuine handwriting of the

46 said Hugh M. Allwood, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said James R. Kingsley.

ERNEST L. HICKS,
[SEAL.] *Notary Public, New York County.*

Certificate filed in Kings, Queens, Richmond and Westchester Counties.

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company, in the City of Baltimore,

State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"*Resolved*, That in pursuance of Section eight hundred and "eleven of the Code of Civil Procedure of the State of New York, "Henry B. Platt, Vice-President, or George Sewell Bonner, Attor- "ney, or Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh "M. Allwood and James R. Kingsley, Attorneys in Fact of this Com- "pany, in the State of New York, be, and each of them is, hereby "authorized and empowered to sign, execute and deliver any and all "bonds or undertakings for or on behalf of this Company, and to "attach thereto the seal of the corporation, the same to be attested "by the said George Sewell Bonner, Attorney of the Company, or "by either one of the other persons above named, as occasion may "require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, attorney in fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original
47 resolution. Given under my hand and the seal of the company, at the City of New York, this 11th day of May, 1906.

JAMES R. KINGSLEY,
Attorney in Fact.

[SEAL.]

Fidelity and Deposit Company of Maryland.

Statement, December 30th, 1905.

Resources.		Liabilities.	
Real Estate	$757,000 00	Capital Stock	$2,000,000 00
Stocks and Bonds	3,451,925 00	Surplus and Undivided Profits	2,726,700 56
Railroad Bonds	1,231,250 00	Premium Reserve Requirements	718,091 62
British Consols	239,500 00	Reserve for Contingent Claims	664,787 60
Net Premiums Due	102,875 62	Claims adjusted (Checks out)	5,015 48
Cash in Bank, &c	367,943 19	Claims in Process of Adjustment	35,898 55
	$6,150,493 81		$6,150,493 81

STATE OF NEW YORK, *County of New York, ss:*

James R. Kingsley, being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of December 30th, 1905, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me this 11th day of May, 1906.

ERNEST L. HICKS,

[SEAL.] *Notary Public, New York County.*

Certificate filed in Kings, Queens, Richmond and Westchester Counties.

(Endorsed:) Bond and Order approving same. Filed May 18, 1906.

48 UNITED STATES OF AMERICA,
Eastern District of New York:

I, B. Lincoln Benedict, Clerk of the Circuit Court of the United States for the Eastern District of New York, in the Second Judicial Circuit, do hereby certify that the foregoing is a true transcript of the summons, complaint, answer, minutes of court, judgment, bill of exceptions and appeal papers, and of the whole thereof, made up to be transmitted to the United States Circuit Court of Appeals for the Second Circuit, on writ of error of the defendant, in the suit wherein Edward Anderson is plaintiff and the Standard Oil Company is defendant.

In witness whereof I have hereunto set my hand and the seal of this Court the 8th day of June, 1906.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Eastern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you or some of you, between Edward Anderson, plaintiff, and The Standard Oil Company, defendant, a manifest error hath happened, to the great damage of the said The Standard Oil Company, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you,

49 if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 9th day of June, 1906, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of May, in the

year of our Lord one thouasnd nine hundred and six, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

EDWARD B. THOMAS,
U. S. Judge.

(Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit.—The Standard Oil Company, Plaintiff in Error, *vs.* Edward Anderson, Defendant in Error.—Writ of Error.—Charles W. Fuller, Attorney for Plaintiff in Error, 1 Montgomery St., Jersey City, N. J.—Received and filed May 18th, 1906.

50 By the Honorable Edward B. Thomas, one of the Judges of the Circuit Court of the United States for the Eastern District of New York, in the Second Circuit.

To Edward Anderson, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 9th day of June, 1906, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of New York, wherein the Standard Oil Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Brooklyn, in the City of New York, in the District and Circuit above named, this 18th day of May, in the year of our Lord one thousand nine hundred and six, and of the Independence of these United States the one hundred and thirtieth.

EDWARD B. THOMAS,
Judge Holding the Circuit Court of the United States for the Eastern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Edward Anderson, Defendant in Error, *vs.* The Standard Oil Company, Plaintiff in Error.—Citation.—Due and timely service of a copy of within citation is hereby admitted.—Hover & Pettigrew, Attys. for Defendant in Error. N. Y., May 18, 1906.—Received and filed May 21, 1906.

51 United States Circuit Court of Appeals for the Second Circuit.

No. 162, October Term, 1906.

Argued February 5, 1907; Decided February 26, 1907.

THE STANDARD OIL COMPANY, Plaintiff in Error,
vs.
EDWARD ANDERSON, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of New York.

Before Judges Wallace, Lacombe, and Coxe.

This cause comes here upon appeal from a judgment of the Circuit Court, Eastern District of New York, in favor of defendant in error who was plaintiff below. The action is to recover damages for personal injuries and the jury brought in a verdict for the plaintiff.

LACOMBE, *Circuit Judge:*

Plaintiff, who was in the employ of one Terence, a master stevedore, was engaged with others in loading the S. S. *"Susquehanna"* with case oil at the dock of the Standard Oil Company, in Bayonne, N. J. A foreman and a gang of men hired by Terence were located at different stations about the ship or on the dock each engaged in performing his respective duty. The plaintiff was in the hold,
52 and was struck by a draft of cases which was lowered at a time when he was not expecting it to descend. The hoisting from the dock and lowering into the hold was accomplished by the use of a steam winch located on the dock some 50 feet distant from the hatch. A "gangway-man," one of Terence's employees, gave signals by whistle to the winchman, thus advising him when to run the winch forward or back and when to stop. The evidence shows that the accident happened because the winchman reversed the winch (so as to lower the draft) before signal to do so was given him.

The jury found that he was at fault and that the plaintiff was free from any contributory negligence. There was evidence to warrant both these findings and their verdict thereon is to be taken as conclusive. Some argument is presented here as to the plaintiff's alleged carelessness, and as to the negligence of some others of his gang, but the only point seriously urged is that plaintiff and the winchman were fellow-servants. If they were not the judgment must stand because the verdict has eliminated all other questions from the case. If the gangwayman or the man who hooked the slings were also negligent, plaintiff if not a fellow servant with the winchman, could recover if the latter's negligence was a proximate cause of the accident.

The master stevedore hired the longshoremen, and contracted with the defendant for the steam power, agreeing to pay "$1.50 a thou-

sand for hoisting." The winch was the property of defendant, standing on its dock and it selected, hired and paid the winchman who ran it. The master stevedore did not pay the winchman, nor hire him, and could not discharge him if he didn't suit; in the latter event he would complain to the defendant company. This case is therefore, on all fours with *The Slingsby* (120 F. R. 748), where we held a sailor operating a ship's winch by order of her captain to assist a gang of longshoremen in discharging cargo was not their fellow-servant although he received the signals to run the winch forward or to reverse from their foreman. Our attention has been called to *The Elton* (142 F. R., 367) in which the Circuit Court of Appeals in the Third Circuit reached a different conclusion upon
53 a similar state of facts. We regret that we are not able to agree with the conclusions of law reached by that eminent court, but we see no reason to change the opinion heretofore expressed in *The Slingsby*, which was reached after a careful examination of the authorities cited in *The Elton*.

The judgment is affirmed.

C. W. Fuller, for the Plaintiff in Error.
B. L. Pettigrew, for the Defendant in Error.

54 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 9th day of March one thousand nine hundred and seven.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Circuit Judges.

STANDARD OIL COMPANY, Plaintiff in Error,
vs.
EDWARD ANDERSON, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

E. H. L.
A. C. C.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

55 Endorsed: United States Circuit Court of Appeals, Second Circuit. Standard Oil Co. *vs.* E. Anderson. Order for Mandate. United States Circuit Court of Appeals Second Circuit Filed Mar. 11 1907 William Parkin Clerk.

56 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 55 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Standard Oil Company, *against* Edward Anderson as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of March in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the said United States the One Hundred and thirty-first.

WM. PARKIN, *Clerk.*

[Seal United States Circuit Court of Appeals, Second Circuit.]

57 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Standard Oil Company is plaintiff in error, and Edward Anderson is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Eastern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay
58 to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of April, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

59 [Endorsed:] File No. 20,656. Supreme Court of the United States. No. 691, October Term, 1906. Standard Oil Co., *vs.* Edward Anderson. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 18 1907 William Parkin, Clerk.

60 (Copy.)

United States Circuit Court of Appeals, Second Circuit, October Term, 1906.

STANDARD OIL COMPANY, Plaintiff in Error,
vs.
EDWARD ANDERSON, Defendant in Error.

It is hereby, on this eighteenth day of April, in the year of our Lord one thousand nine hundred and seven, stipulated and agreed by and between the above-named parties by their respective attorneys, that the certified copy of the transcript of the record in said cause, whereon the writ of certiorari was granted on the sixteenth day of April, instant, the same being now on file in the office of the Clerk of the Supreme Court of the United States, be taken as the return of the Circuit Court of Appeals for the Second Circuit to said writ of certiorari.

CHARLES W. FULLER,
Attorney for Plaintiff in Error.
BERTRAND L. PETTIGREW,
Attorney for Defendant in Error.

61 Endorsed: United States Circuit Court of Appeals, Second Circuit. Standard Oil Company, Plaintiff in error, *vs.* Edward Anderson, Defendant in error. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Ap'l 18, 1907, William Parkin, Clerk.

62 To the Honorable the Supreme Court of the United States:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as a return to the Writ of Certiorari issued herein.

Dated New York, April 18, 1907.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Seal United States Circuit Court of Appeals, Second Circuit.]

63 [Endorsed:] 696 20656, United States Circuit Court of Appeals, Second Circuit. Standard Oil Company *vs.* Edward Anderson. Return to Certiorari.

64 [Endorsed:] File No. 20,656. Supreme Court U. S. October Term, 1907. Term No. 275. The Standard Oil Company, Petitioner, *vs.* Edward Anderson. Writ of Certiorari and return. Filed April 20", 1907.

Office Supreme Court, U. S.
FILED.
APR 5 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted] 58.

THE STANDARD OIL COMPANY, PETITIONER,

vs.

EDWARD ANDERSON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES W. FULLER,
Counsel for Petitioner.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 26071

(20,656.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 691.

EX PARTE STANDARD OIL COMPANY, PETITIONER.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Second Circuit to Certify to the Supreme Court, for its Review and Determination, the Case of Standard Oil Company, Appellant, vs. Edward Anderson, Respondent.

To the Honorable the Supreme Court of the United States:

The petition of Standard Oil Company respectfully shows to this honorable court as follows:

1. Edward Anderson commenced an action against your petitioner for personal injuries alleged to have resulted from the negligence of a winchman furnished by your petitioner; that said Anderson was employed by a stevedore engaged in loading a vessel at one of the piers of your petitioner in the city of Bayonne, New Jersey; that said Anderson recovered a judgment in the United States Circuit Court for the Eastern District of New York in the sum of fifteen hundred dollars and costs.

2. That a writ of error was duly taken to the United States Circuit Court of Appeals for the Second Circuit, and argu-

ment heard thereon in October, 1906, term; that on the twenty-sixth day of February, 1907, a decision was rendered by said United States Circuit Court of Appeals for the Second Circuit affirming the judgment below, and a mandate in accordance with such decision was duly issued by said court.

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as part of this application, in conformity with rule 37 of this honorable court relative to cases from Circuit Courts of Appeals, and the same is marked Exhibit "A."

Your petitioner is advised and believes that the said judgment of the said Circuit Court of Appeals in said case is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said act.

The said case was decided in the said Circuit Court of Appeals for the Second Circuit on the ground that the winchman was not a fellow-servant of the plaintiff, and in its opinion the said court stated that it saw no reason to change its opinion expressed in the case of *The Slingsby,* 120 F. R., 748, because of the decision rendered by the Circuit Court of Appeals for the Third Circuit in the case of *The Elton,* 142 F. R., 367.

In the case of *The Slingsby* the Circuit Court of Appeals for the Second Circuit decided that a winchman was not a fellow-servant. In the case of *The Elton* the Circuit Court of Appeals for the Third Circuit decided that a winchman, under the same circumstances, was a fellow-servant. In the

latter case, in delivering the opinion of the court, Gray, J., says:

> "That there is a want of harmony in the cases as to the general question, whether men in the position of the libelant and winchman are fellow-servants, is recognized in the cases relied upon by the counsel for the libelant. The first of these is *The Slingsby*, 120 Fed., 748; 57 C. C. A., 52, in which the Court of Appeals for the Second Circuit, in a case very like the present, directly decides that the winchman was the servant of the ship, and not of the stevedore, and that the ship was liable to the plaintiff for its negligence. We regret that we are not able to agree with the conclusions of law and fact reached by that eminent court. In a case like the present, we think the true test of fellow-servant is, whether both are, at the precise time of the accident, working in a common employment, under the same general control and direction. We think reason and the weight of authority support this view."

The attention of the United States Circuit Court of Appeals for the Second Circuit having been called to the decision in the case of *The Elton*, it stated in its opinion in the present case:

> "This case is, therefore, on all fours with *The Slingsby* (120 F. R., 748), where we held that a sailor operating a ship's winch by order of her captain to assist a gang of longshoremen in discharging cargo was not their fellow-servant, although he received the signals to run the winch forward or to reverse from their foreman.
>
> "Our attention has been called to *The Elton* (142 F. R., 367), in which the Circuit Court of Appeals for the Third Circuit reached a different conclusion upon a similar state of facts. We regret that we are not able to agree with the conclusions of law reached by that eminent court, but we see no reason to change the opinion heretofore expressed in *The Slingsby*, which was reached after a careful examination of the authorities cited in *The Elton*."

For the reason that these decisions of the said Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals for the Third Circuit are variant and contrary to each other, this case should be reviewed by this honorable court.

Therefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "Standard Oil Company, plaintiff in error, *vs.* Edward Anderson, defendant in error, No. 162," to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

CHARLES W. FULLER,
Of Counsel.

[Endorsed:] Supreme Court of the United States, October term, 1906. *Ex parte:* Standard Oil Company, petitioner. Petition for writ of certiorari to Circuit Court of Appeals, Second Circuit. Charles W. Fuller, attorney of petitioner. Office and post-office address: 52 Broadway, New York city, borough of Manhattan, N. Y.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 58.

STANDARD OIL COMPANY,

Petitioner,

vs.

EDWARD ANDERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES W. FULLER,

Counsel for Plaintiff in Error.

A. J. DOAN, Book and Job Printer, 94 Montgomery St., J. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No 275.

STANDARD OIL COMPANY, PETITIONER.

vs.

EDWARD ANDERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

The material facts of this case are that the plaintiff below, who was in the employ of one Terence, a master stevedore, was engaged with others in loading the steamship Susquehanna with case oil at the dock of the Standard Oil Company, in Bayonne, N. J. A foreman and a gang of men hired by Terence were located at different statio about the ship or on the dock, each engaged in performing his respective duty. The plaintiff was in the hold, and was struck by a draft of cases which was lowered at a time when he was not expecting it to descend. The hoisting from the dock and lowering into the hold was accomplished by the use of a steam winch located on the dock some 50 feet distant from

the hatch. A gangwayman, one of Terence's employes, gave signals by whistle to the winchman, thus advising him when to run the winch forward or back, and when to stop. The evidence shows that the accident happened because the winchman reversed the winch (so as to lower the draft) before signal to do so was given him. It is established by the verdict of the jury that the winchman was at fault and that the plaintiff was free from contributory negligence. The plaintiff, and the other longshoremen were hired by the master stevedore. The winchman, whose negligence caused the accident, was furnished to the master stevedore by the defendant, who also furnished the winch and steam power, in pursuance of a contract by which the stevedore agreed to pay "$1.50 a thousand for hoisting." The wages of the winchman were paid by the defendant. The stevedore could not discharge the winchman if he did not suit; in that event he would complain to the defendant company. But the winchman was placed absolutely under the control and direction of the foreman of the stevedore, who had the power of directing him in the discharge of his duties at the winch, and who regulated the hours of labor.

In view of the verdict of the jury by which it was determined that the injury was caused by the negligence of the winchman and that the plaintiff was free from contributory negligence. the only question to be determined in this case now, is whether the negligent winchman was in the employ of the defendant (now the plaintiff in error) in such

a sense that the defendant is to be held liable for his negligence. To be strictly accurate, no question of fellow servant is involved in this case at all. If the action were against the stevedore, who employed the plaintiff, a question of fellow servant would arise. But since the plaintiff was not employed by the defendant, the only question to be determined is whether the defendant and the negligent winchman sustained to each other the relation of master and servant in such a sense that the defendant is liable for the winchman's negligence within the *respondeat superior* doctrine. But while this is so, cases in which it is held that where a servant who is in the general employment of one person enters the particular or special employment of another, he becomes the servant of the special master with relation to the particular service, and, therefore, the fellow servant of the other employees of the special master, are in point, for the reason that they show that in such a case, a servant who is thus transferred from the general employment of one person to the particular employment of another becomes, for the time being, the servant of the special master. Therefore, cases of this character will be cited along with the cases which involve only the application of the *respondeat superior* doctrine.

Upon the question under consideration there is a direct and irreconcilable conflict of opinion in the cases decided by our federal courts. The cases which are opposed to the position taken by the plaintiff in error in the case at bar will first be reviewed in their chronological order. In the case of The Victoria, 69 Fed. Rep., 160, it was held that where a stevedore engaged in discharging cargo was injured by being struck by a sling which the winchman, employed by the vessel, started too rapidly, the doctrine of fellow servant did not apply, and the ship was liable for the injury caused by the negligence of the winchman. In the opinion the court merely cited the case of Johnson v. Netherlands, etc., Nav. Co., 132 N. Y., 576, 30 N. E., 595, without discussing the principle applied. And in this New York case there is also a reliance on authority alone, with three of the judges dissenting. In McGough v. Ropner, (Dist. Ct. E. D. Pa., 1898), 87 Fed. Rep., 534, it was held on the authority of earlier federal and New York case cited above, without any discussion of the question, that where a stevedore contracts to load a ship, the ship to furnish the winch and man to operate it, the man operating the winch and an employee of the stevedore are not fellow servants. In the case of The Lisnacrieve, 87 Fed. Rep., 570, it was held that where the owners of a ship furnish a winchman to assist in unloading, they are liable to an employee of the stevedore, who is unloading the ship under a contract, for injuries caused by the negligence of the winchman, and although such winchman is

working under the orders of the stevedore. In deciding this case the court laid stress on the fact that the winchman had been selected, was paid and could only be discharged by the owners of the ship. In the case of The Slingsby, 120 Fed. Rep., 748, affirming 116 Fed. Rep., 227, it was held that a winchman employed by a steamship was not the fellow servant of the employee of the stevedores engaged in unloading the ship, and that the ship was liable to the employee of the stevedores for injury caused by the negligence of the winchman, in starting the winch without orders. In this case there was not, as in the case at bar, any agreement by which the stevedores should pay for the services of the winchman. The court, however, took the view that the price which the stevedores charged for unloading was undoubtedly less thar it would have been had not the ship furnished winches and drivers, so that, indirectly, the pay for the services of the winchman may be said to have come from the stevedores. But the court gave little importance to this fact and held that when A and not B is the one who selects and retains an individual at a particular piece of work to which he is assigned, such individual does not become B's servant merely because the latter indirectly pays for his services and gives him his working orders. This case was followed without any discussion of the question in The Gladestry, 128 Fed. Rep., 591, and in The Gladestry, 128 Fed. Rep., 1019. See also the City of San Antonio, 135 Fed. Rep., 879, 143 Fed. Rep., 955. Of these cases which are opposed to the contention

of the appellant, the case of The Slingsby is the only one in which the question involved received any consideration on principle, so far as the published opinions show.

Of the federal cases in which the appellant's contention finds support the first is the case of The Harold, 21 Fed., 428. In this case the libelant, who was one of several men employed to shift coal on a ship, sued to recover for injuries sustained through the negligence of a winchman. The libelant, and the other members of the gang of workmen to which he belonged, were employed by a stevedore, their wages being paid by the ship through the stevedore. The man at the winch was furnished by the ship and his wages were paid directly by the ship. He was acting under the immediate orders and direction of the stevedore's men. It was held that the libelant and the winchman were fellow servants, it being immaterial whether the men should be regarded as the servants of the stevedore or the servants of the ship, since all were under a common direction and in a common service. This decision was followed in Lonergan v. The Island, 28 Fed. Rep., 478, a case involving a similar state of facts. While there may be some question as to the applicability of these decisions to the case at bar, this is not so of the case of The Elton, 142 Fed. Rep., 367. In this case the United States District Court

for the Eastern District of Pennsylvania reached the same conclusion as was reached in the cases cited above as being opposed to the appellant's contention. Relying upon some of the earlier cases, without discussing the question, the court held that a sailor placed at the winch by the officers of a vessel, in compliance with the charter party requiring the ship to furnish cranes and winches, with necessary steam power and hands for unloading, is not a fellow servant of the employees of a stevedore engaged in discharging the vessel. But when this case came up on appeal before the Circuit Court of Appeals for the Third Circuit (The Elton, 142 Fed. Rep., 367) the decree of the court below was reversed. The court expressly declined to follow the decision in the case of The Slingsby, 120 Fed. Rep., 748. It is true that there was testimony in the case to the effect that the winchman could have been removed at any time, and another put in his place by the stevedore. But the court does not seem to have laid much stress on this fact but emphasized the fact that the officers of the ship had no direction or control of the winchman in the actual work of unloading but that he was under the direction and control of the stevedore. It was declared that "the true test of fellow servant is, whether both are, at the precise time of the accident, working in common employment, under the same general control or direction."

This is the contention of the appellant. As will appear presently, with the exception of the federal cases cited above and certain New York cases in

which the question was not well considered in the published opinions, and which are now of questionable authority even in New York, the authorities are agreed that the power of the alleged master to direct and control the acts of the alleged servant is the criterion by which the relation of master and servant is to be determined both within the *respondeat superior*, and the fellow-servant doctrines. As was said in Brady v. Chicago, etc., R. Co., 114 Fed. Rep., 100, 57 L. R. A. 712, in a syllabus written by the Court, the power of the alleged master or principal to command or direct the alleged servant or agent is the test of liability of the former for the acts of the latter, under the maxim *respondeat superior*. In Sargent Co. v. Baublis, 215 Ill., 428, it was said that "A master is one who has the direction and control of another performing services for him, and if one is subject to the orders and direction of another in the performance of services and duties he is a servant." And in a recently published work which purports to be a presentation of the theory and development of the common law, it is said:

> "The proper criterion by which to determine whether in a given case the relation of master and servant exists is found in the right of the master to order and control the other in performance of the work. A master is one who not only prescribes to the workmen the end of his work, but directs, or at any moment may direct the means also; or, as it has been put,

'retains the power of controlling the work.'"

2 Street on Found. of Leg. Liab., p. 468.

This principle is well established by the English cases.

In Murray v. Currie (1870), L. R., 6 C. P., 24, Brett, J., said:

> "I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor."

In Rourke v. White Moss Colliery Co. (1876), 2 C. P. Div., 205, 46 L. J. C. P., 283, affirming 1 C. P. Div., 556, the defendants were the proprietors of a coal mine, and had been sinking a shaft themselves; but ultimately they entered into a contract with one W. to do the work. The plaintiff who up to that time had been employed by the defendants, then became the servant of W. and was paid wages by him. The plaintiff was injured through the negligence of an engineer appointed by the defendant to work a steam-engine which under the contract with W was provided by them to facilitate the work. The engineer, though employed and paid by the defendants, was with the engine placed under the sole orders and control of W. The Judges of the

Court of Common Pleas were unanimously of the opinion that the engineer was in the employ of W rather than the defendants, although he had been appointed, and his wages were paid, by them. In the Court of Appeal, the Judges were unanimously of the opinion that the judgment of the court below should be affirmed. In the reports of this case it does not appear that W possessed the right to discharge the engineer. It was regarded sufficient to make him the servant of W that he was under the control of W rather than the defendants. For example, Cockburn, C. J., said:

> "It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. Looking at the present case, I think we must arrive at the conclusion that Lawrence was practically in Whittle's service at the time he was guilty of the negligence complained of; and this being so, it follows that Lawrence became the fellow-servant of the plaintiff; and it is settled law, which it is now too late to disturb, that a servant cannot recover

damages from his employer for any injury he may have sustained through the negligence of a fellow-servant."

It was said of this decision in a later case that it "makes it quite clear that a man may be the general servant of one person, and yet at the same time be the servant of another in relation to a particular matter, and it also shows that the important element, whereby to determine whether he is the servant of the one person or of the other in relation to the particular business on which he is engaged, is which of the two persons had the control of him in the conduct of that business."

Jones v. Scullard (1898), 2 Q. B., 565.

This case has often been referred to in later English cases but an exhaustive search has failed to bring to light any instance where the soundness of the decision has been questioned. On the contrary the decision has often been tacitly accepted as correct and was strongly approved in the later case of Donovan v. Laing, etc., Construction Syndicate (1893), 1 Q. B., 629, a case which involved a state of facts very similar to those of the case at bar. The facts of this case were that the plaintiff was in the employ of Jones & Co., a firm of wharfingers, to assist in the loading of a ship at their wharf. This firm had entered into a contract with the defendants by which the latter, for a consideration, supplied a crane and a man to work it whenever a ship was to be loaded or unloaded. The man sent in charge of the crane worked it in conformity with

directions received from Jones & Co. or their servants. Through his negligent operation of the crane the plaintiff, whose duty it was to give signals for the management of the crane, was injured. It was held that, though the man in charge of the crane remained the general servant of the defendants yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. Lord Esher, M. R., said:

> "In this case the crane and the man to work it were lent by the defendants to Jones & Co. for a consideration, and to be used in the manner I have described. For some purposes, no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and in consequence any one was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that

> he was the servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority, but there is authority for it without going back to an earlier date, in the case of Rourke v. White Moss Colliery Co."

It is true that the learned Judge said that Jones & Co. possessed the right to discharge the man sent to operate the crane. But it is believed that this incidental remark should not be given the importance that it received in the opinion rendered in the case of The Slingsby, 120 Fed. Rep., 752. In the first place, as pointed out in that opinion, "the statement of facts does not show whether the assumption of the learned Master of the Rolls was fully warranted by the proofs." In the next place, the right of discharge was not given any importance even by Lord Esher, and the remaining two Judges, Lindley and Bowen, did not even mention the matter of the right to discharge. In each of the three opinions the fact that the man in charge of the crane "was bound to work under the orders of Jones & Co." was clearly deemed to be the controlling fact. This appears by the above quotation

from the opinion by Lord Esher. And in the opinion by Lindley, L. J., it was said: "The key to the whole case is that Lindley & Co. were loading the ship, and not the defendants." Bowen, L. J., said: "We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act." But in addition to this, it is very probable, considering the nature of the contract, the improbability that the owners of a valuable piece of machinery would give the bailee a right to discharge a man selected by them for its management and place another person in his place, and that the statement of facts contains no reference to the possession by Jones & Co. of the right to discharge, that Lord Esher meant nothing more than that if Jones & Co. saw the man supplied to work the crane misconducting himself or disobeying their orders, they would have a right, under the contract, to refuse to continue the use of the crane and the man supplied to work it until a competent workman should be furnished. The existence of such a right is undoubted, and could easily have been assumed by the learned Judge. It, therefore, will not do to assume, as was done in The Slingsby, 120 Fed. Rep., 752, that this decision is to be taken as authority only in cases where the right to discharge from the particular employment exists.

The case has not been so understood in later English cases. In stating the effect of the decision

Lord Russell of Killowen, C. J., in the case of Jones v. Scullard (1898), 2 Q. B., 565, said that "it was held that though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed." In this case the defendant was held liable for the negligence of a servant who was in the general employment of another person named Walker, but in the particular employment of the defendant, although as stated by the learned Chief Justice, the servant "could not be dismissed from Walker's employment by any act of the defendant." And yet the case of Donovan v. Laing, etc., Syndicate, was regarded as giving direct support to the view taken. It may be well to state the substance of this case more fully, for it directly supports the contention of the plaintiff in error that a person who avails himself of the services of a person who is in the general employment of another may become liable for the negligence of the servant while acting within the scope of the special service, although he, the special master, does not possess any power of discharge, and that the controlling factor which fixes the liability is the exercise of direction and control by the special master at the time of the negligent act of omission. The facts of this case were that the defendant was the owner of a brougham, horses and harness which he kept at a livery stable. The keeper of the livery stable, Walker, was in the habit of supplying the

defendant with one of his own servants to drive the brougham. One day, whilst the brougham was being driven with one of the defendant's horses, the driver, Loveday, owing to his negligence, as the jury found, lost control of the horse, which dashed through the window of the plaintiff's shop and did damage. The man, Loveday, who was driving the brougham at the time of the accident had continuously driven the defendant for the preceding six weeks, and at the time of the accident was wearing a suit of livery which had been supplied to him by the defendant. In rendering the opinion the learned Chief Justice said:

> "The question which arises for decision upon the facts of this case is whether the fact that Loveday was undoubtedly in a general sense the servant of Walker and could not be dismissed from Walker's employment by any act of the defendant is sufficient to relieve the defendant from responsibility for the negligence of Loveday while driving him."

It was held that upon the facts there was evidence on which a jury might find that the driver at the time of the accident was acting as the servant of the defendant, so as to render the defendant responsible for the consequence of his negligence.

The case of Waldock v. Winfield (1901), 2 H. B., 596, is another late English case in which it is held that control of a servant is the element which de-

termines the liability for its negligence as between the general and the special master, but since the facts differ greatly from those of the case at bar they will not be here stated.

In the Canadian case of Hastings v. LeRoy, No. 2, 34 Can. Sup. Ct., 177, affirming 10 Brit. Col., 9, it was likewise held by the majority of the court that the decisive test of whether the relation of fellow servant exists is "who has the control and direction of the negligent and injured persons." In the court below the English cases Rourke v. White Moss Colliery Co. and Donovan v. Laing, etc., Syndicate, were considered and applied.

Coming now to our state courts, we find a number of decisions to the effect that the power of the special master to direct and control the servant is regarded as the decisive factor. The rule applied in these cases is that when one person lends or hires a servant to another for a particular employment, the servant for anything done in the particular employment must be dealt with as the servant of the man to whom he is lent or hired, although he remains the general servant of the person who lent or hired him.

Parkhurst v. Swift, 31 Ind. App., 521;

Kimball v. Cushman, 103 Mass.; 194, 4 Am. Rep., 528;

Johnson v. Boston, 118 Mass., 114;

Clapp v. Kemp, 122 Mass., 481;

Ward v New England Fibre Co., 154 Mass., 419;

Hasty v. Sears, 157 Mass., 123, 34 Am. St. Rep., 267;

Morgan v. Smith, 159 Mass., 570;

Reagan v. Casey, 160 Mass., 374;

Geary v. Stevenson, 169 Mass. 23;

Haskell v. Boston Dist. Messenger Co., 190 Mass., 189;

Ewan v. Lippincott, 47 N. J. L., 192, 54, Am. Rep., 148;

Delaware, etc., R. Co. v. Hardy, 59 N. J. L., 35;

4 Am. & Eng. R. Cas., N. S. 577, 59 N. J. L., 562;

Norman v. Middlesex, etc., Traction Co., 68 N. J. L., 728.

In two late Illinois cases it is said:

"One who is the general agent of another may be loaned or hired by his master to a third party for some special service, and as to that particular service he will become the servant of the third party. The master is the one who has the direction and control of the servant, and the test is, whether in the particular service the servant continues liable to the direction and control of his master or becomes subject to the party to whom he is loaned or hired."

Grace, etc., Co. v. Probst, 208, Ill., 147.

Consolidated Foreworks Co. v. Koehl, 190 Ill., 145.

In Coughlan v. Cambridge, 166 Mass., 268, Morton, J., in delivering the opinion of the Court said:

> "It is well settled that one who is the general servant of another may be lent or hired by his master to another for some special service, so as to become as to that service the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired."

This language was quoted with approval in Samnelian v. American Tool, etc., Co., 168 Mass., 12. In Delory v. Blodgett, 185 Mass., 126, 102 Am. St. Rep., 328 it was said.

> "It makes no difference whether the proprietor to whom a servant is lent actually exercises his right of control and direction as to the details of the work, or simply sets the servant to do what is necessary, trusting to his expert skill for the result. This was decided in Linnehan v. Rollins, 37 Mass., 123. * * * The question in every case is whether the proprietor for whom the

> work is being done has given up his proprietorship of the particular business to an independent contractor and has thus divested himself of the right of control, so that he has no longer a legal right to terminate the work or direct it."

New York is the only state, so far as has been ascertained by a thorough search for decisions on this question by the state courts, in which may be found decisions opposed to the contention of the plaintiff in error. The cases of Sanford v. Standard Oil Co., 118 N.Y., 571, 24 N. E. Rep., 313, and Johnson v. Netherlands, etc., Nav. Co., 122 N. Y., 576, 30 N. E., 505, are directly opposed to that contention. But the opinions delivered in these cases do not contain any discussion of the principle applied, and the authority which they might otherwise possess is further impaired by the fact that there are other decisions by the same court of a later date expounding and applying principles which are wholly inconsistent with the judgments rendered in these cases, and which give support to the contention of the plaintiff in error. For example, it has been said: "The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong, at the time and in respect to the very transaction out of which the injury arose. * * * The fact that the party, to whose wrongful or negligent act an in-

jury may be traced, was at the time in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time and who has the right to control and direct his conduct."

Wyllie v. Palmer, 137 N. Y., 248, 33 N. E. Rep., 381, 19 L. R. A., 285.

In Anderson v. Boyer, 156 N. Y., 93, reversing 13 N. Y. App. Div., 258, the facts were that the owner of a lighter, by his contract with a charterer, gave the latter possession and absolute control of the boat and its captain until the charterer should have accomplished the work for which he engaged the boat, including its unloading, and a third person was injured through the negligence of the captain in unloading the charterer's goods at destination. The Appellate Division held that the owner of the lighter was liable, and cited, among others, the cases of Sanford v. Standard Oil Co., *supra*. But the Court of Appeals held that the captain should be deemed to have been acting as the servant of the charterer, and not of the owner, and his negligence was not chargeable to the owner, who, being under no obligation to unload the boat, had not in fact attempted to control or interfere with it. In Higgins v. Western Union Tel. Co., 156 N. Y., 75, 50 N. E. Rep., 500, 66 Am. St. Rep., 537, reversing 11 Misc. (N. Y.), 32, it appears that a contractor for the repair of a building, including the furnishing of elevators, having placed the ele-

vators in position, and upon a general servant of the owner of the building whose duty it was to conduct the elevators for passengers, to operate an elevator so that a mason, in the service of the contractor, could use it as a movable platform in plastering the shaft. The conductor, having suspended carrying passengers, operated the elevator for the mason, under the latter's direction, and while so engaged the mason was injured through the conductor's negligence. The mason thereupon sued the owner of the building for damages It was held that a recovery against the owner on the ground of his responsibility for the conductor's negligence under the doctrine of *respondeat superior*, was not warranted. In delivering the opinion of the Court, O'Brien, J., said:

> "The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong, at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced was, at the time, in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time and who has

> the right to control and direct his conduct."

The learned Judge cited, among other cases, the English case of Rourke v. White Moss Colliery Co., which has been considered above, as a decision in point. In Murray v. Dwight, 161 N. Y., 301, 55 N. E., 901, 48 L. R. A., 673, Gray, J., in commenting upon the case of Donovan v. Laing, and other English cases, said:

> "The English cases fully recognize the rule that a man may be a general servant of one person and yet, at the same time, be the servant of another in relation to a particular matter. They hold that the important element, in determining whose servant for the time being he is, is, which of the two persons had the control of him in the conduct of the particular business."

That the question under consideration is not satisfactorily settled by the two New York cases cited above which are opposed to the contention of the appellant, appears by the fact that the Appellate Division, a court of inferior jurisdiction which ordinarily follows the decision of the Court of Appeals when their effect and meaning can be ascertained, recently decided a case which directly supports the contention of the appellant. This is the case of Quinn v. National Sugar Refining Co., 102 N. Y. App. Div., 47, which was an action brought against a sugar refining company to recover dam-

ages for personal injuries sustained by the plaintiff. It appeared that the plaintiff was in the employ of a lighterage company engaged in unloading sugar from a lighter upon a dock of the sugar refining company. In transferring the sugar from the lighter to the dock, the lighterage company made use of a winch belonging to the sugar refining company, which winch was operated by steam furnished by the sugar refining company and was in charge of an engineer in its employ. The lighterage company paid the sugar refining company an agreed price per hour for the use of the winch and the services of the engineer. While the plaintiff was at work he was knocked down and injured by a load of sugar which he claimed had been improperly set in motion through the negligence of the engineer in starting the winch before receiving the proper signal. It was held that the plaintiff and engineer of the winch were fellow servants and that the plaintiff was not entitled to recover against the defendant. In delivering the opinion of the court, Woodward, J., said:

> "Where there is unity of service and control in any particular employment, even though one of the servants is in the general employ of another, the law is well established that they are to be treated as co-servants as to the particular employment in which they are at the moment engaged."

And there are other cases in which the same

general principle is recognized and which conflict with the two first-cited New York cases.

Breslin v. Sparks, 97 N. Y. App. Div., 69;
Baldwin v. Abraham, 57 N. Y. App. Div., 67;
Affirmed, without opinion, 171 N. Y., 677.

The foregoing is believed to be a faithful presentation of the present state of the authorities upon the question involved in this case. Other cases than those considered above are sometimes cited in the opinions and treatises dealing with this question, but it is believed that the decisions here cited are all that are sufficiently in point to be worth citing.

So far as authority goes we have then, in support of the contention of theplaintiff in error; (1) the latest and best considered federal case; (2) the very well considered English cases; (3) a decision by the Supreme Court of Canada, and (4) all of the cases decided by our state courts, except two New York cases, the authority of which has been greatly impaired by later decisions by the courts of that state.

It will have been observed that the opinions which support the minority rule place a great deal of stress upon the possession by the alleged master

of a right to discharge the servant. These cases seem to hold that if a servant who is in the general employment of one person enters the particular employment of another person, the latter, who is usually called the special master, does not incur liability for the negligence of the servant within the *respondeat superior* doctrine unless he has a right to discharge the servant for incompetency or disobedience. The unexpressed idea seems to be that it would be unjust to hold the special master liable for the negligence of the servant of another whom he cannot discharge from his employment. If this is the idea underlying the doctrine of these cases it is wholly fallacious. While the special master may not have the power to discharge the incompetent or disobedient servant from the employment of the general master, it is fully within his power to put him out of his own service. If A contracts to furnish B with a servant for a particular piece of work, and the servant proves to be incompetent or otherwise untrustworthy, there can be no question but that B does not violate his contract obligation if he refuses to continue the unsatisfactory servant in his employment for the time stipulated in the contract. This being so a special master has all the power of getting rid of an unsatisfactory servant that is necessary for his own protection. And when this power is coupled with the power to direct and control the servant, the relation of master and servant, within the *respondeat superior* and fellow servant doctrines, should be deemed to be established.

It is submitted that the plaintiff in error is not liable for the act of the servant whose negligence caused the injury for which this suit was brought. It is not claimed that this servant was incompetent, and the whole extent of the duty of the plaintiff in error was to provide a competent servant. * * In the case of The Elton, 142 Fed. Rep., 367, in which it was held that a vessel was not liable to an employee of a stevedore engaged in unloading the vessel for injuries received in consequence of the negligence of a winchman, who had been furnished, and whose wages were paid by the vessel, the court did not rest the decisions alone on the fellow-servant doctrine, but held that if the owners of the vessel had discharged the duty of furnishing a competent winchman, as stipulated, they were not legally responsible for the isolated act of negligence of the winchman, which was alleged to have caused the injury. In delivering the opinion of the court, Gray, Cir. J., said:

> "We think in this respect there is complete analogy of this case, to one where the general servant of another is loaned or hired by the master for some special service, so as to become, as to that service, the servant of such other party. In such case, if the general employer has exercised due care to see that his servant when employed, is competent and skillful, and has no knowledge that he is otherwise, at the time he is furnished for the special service, he has discharged

his whole duty, and cannot be held responsible for an act of negligence of the servant so furnished, loaned or hired, while he is working on such special service under the direction and control of the special master. In the present case, we agree, with the contention of respondents, that, owing to the fact that the ship fully performed its duty under the charter party, by furnishing a competent winchman to work for the charterers, or stevedores employed by them, the ship is not responsible for acts of negligence, if any, on the part of the winchman, during the unloading, whether as a matter of law, the winchman should be deemed a fellow servant of the libelant or not. If the suit were against the stevedore, the question of fellow servant, as between the libelant and the winchman, would probably arise. * * * The ship being only pledged to furnish to the stevedores, winches and winchmen, to be used in the unloading of the ship, its whole duty was performed when it furnished properly constructed winches in good order, and winchmen selected and employed with due and reasonable care as to their skill and competency. Under the circumstances, the libelant's only ground of action against the ship would be negligence in the performance of this duty."

The learned Trial Judge, therefore, erred in charging the jury as follows: "If the stevedore had agreed to furnish all the men, then this plaintiff would have been a fellow servant of the winchman, but as the case stands, the winchman had one master, to wit, The Standard Oil Company; and the plaintiff had another, to wit, the stevedore; therefore, the two men were not fellow servants; therefore, the act of the winchman was the act of the defendant. It doesn't make any difference what act he was performing. He was there representing the defendant, to perform this act, and if his act or omission was negligent, and the plaintiff was injured thereby, then that negligence would be the negligence of the defendant."

CHARLES W. FULLER,

Counsel for Petitioner and
Plaintiff in Error.

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BRIEF FOR DEFENDANT IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1908

No. 58

STANDARD OIL COMPANY,

Petitioner,

against

EDWARD ANDERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BERTRAND L. PETTIGREW,

Counsel for Defendant in Error.

Interborough Printing Co., 116 Nassau Street, N. Y.

SUPREME COURT OF THE UNITED STATES

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STANDARD OIL COMPANY, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Defendant in Error.

Cases of the character of the one at bar depend so largely upon the facts of the individual case that in order to arrive at a correct solution of the problem before the Court herein, it is of the utmost importance that the facts bearing upon the employment and control of the winchman should be thoroughly understood at the outset. If the statement contained in the brief submitted herein on behalf of the plaintiff in error that "the winchman was placed absolutely under the control and direction of the foreman stevedore" were literally true, there might well be an end of the case with-

out more. It is, however, contended on behalf of the defendant in error not only that the winchman was not placed absolutely under the control and direction of the foreman of the stevedore, but that the power of the stevedore to direct or control was quite limited. In fact, that there was no power to control or direct, in the strict sense of the word. The power to control and direct comprehends some means of enforcement. The blasts of the whistle used by the gangwayman cannot, upon the facts of this case, be regarded as commands, but they were, on the contrary, merely signals used by the employees of the stevedore to indicate to the winchman that the part of the work to be performed by the stevedore was completed up to the stage where the plaintiff in error, the master of the winchman, might safely proceed with its part of the work. The dock belonged to the plaintiff in error, as did the winch and drum, which were stationary in a house on the roof of the dock. Terrence, the contracting stevedore for the loading of the ship, testified (p. 13):

> "It was the customary thing to pay $1.50 a thousand for hoisting; they send you a bill and you send them a check. That is all the arrangement I ever had. I conformed to the custom in this case and paid the Standard Oil Company $1.50 a thousand for hoisting. I did not pay that winchman nor hire him. I know them by sight; I don't know any of them by name. I never hired any winchman. I never had any occasion to discharge him; I wasn't his boss; I could not discharge him. . . . I couldn't remove him; I could complain of him; I don't know whether he would be removed."

And again (p. 14):

> "Q. Did you ever try to direct the winchman to move faster or to move more slowly, or any other way than simply to direct him when to start, when to hoist? A. I never did."

The stevedore regulated the hours of labor of the winchman only in this way—that when the stevedore's men quit work there was nothing more for the winchman to do. Had the winchman possessed playful or sportive instincts there was nothing that the stevedore could have done to prevent him from operating his winch twenty-four hours in the day. The winch belonged to his master, the Standard Oil Company; it was upon the property of the Standard Oil Company; the motive power was steam supplied by the Standard Oil Company. Clearly neither the stevedore nor his men had any authority over the winchman or any control of the winch. They could not even enter the winch-house unless permitted to do so by the plaintiff in error.

The stevedore sub-let to the plaintiff in error a part of the work of loading the steamship, to wit, the hoisting, and the utmost that the stevedore or his men could do was to notify the winchman when the part of the work being performed by the stevedore was in a state of readiness for the plaintiff in error to proceed with the part of the work which it had contracted to do.

The manner of loading was as follows:

The oil was run out on trucks by the plaintiff in error and delivered to the "slingers," who were employees of the stevedore, on the dock at the vessel's side, where a rope or "sling" was passed

around the cases by the "slingers" and attached to the hook at the end of the fall. The other end of the fall was attached to the drum of the steam winch. When the draught of oil had been "slung" and was ready to be hoisted, another employee of the stevedore, known as the "gangwayman," who was stationed on the deck, or rather on a platform extending from the rail of the ship out over the side of the hatch, gave the signal by a blast of the whistle to the winchman to hoist or "go ahead" (J. Anderson, p. 11; Tierney, p. 18). The winchman upon receiving the signal "goes ahead" until his mark on the fall shows that the draught has been raised to the desired height and then stops (J. Anderson, p. 12; Tierney, p. 18). The gangwayman, as the draught came up over the side of the ship, caught the fall with a rope called the guy or "check" rope. The "check" rope was made fast to some object at one end and the gangwayman held the other end in his hand. In this manner the gangwayman guided the draught over the center of the hatch, and if everything was ready for the draught to be lowered, signaled the winchman with a blast of his whistle to lower, or, in the phraseology of the longshoremen, "go back." The draughts were then lowered to a point about waist high from the bottom of the hold. The winchman knew when this point was reached by the position of the mark on his fall and stopped the draught there while the men receiving the draught in the hold pushed the same over upon the truck and the winchman then lowered the draught upon the truck upon a further signal from the gangwayman (Connell, p. 16; Tierney, p. 18; J. Anderson, p. 12).

It is not denied that the general servant of one

master may be so placed under the control and direction of another in a particular employment as to become the servant of that other for the purposes of such employment and the fellow servant of the employees of the other in the course of the particular employment. So far as the cases in the brief of the plaintiff in error merely serve to illustrate the truth of this abstract proposition of law, they are of little assistance in the determination of the case. The question is whether, upon the facts of this case, the winchman was engaged in the service of the stevedore and was placed entirely under his control and direction, or if, as contended by the defendant in error, the winchman, at the time of his negligent act, was performing the service of the plaintiff in error and was doing the work which the plaintiff in error had contracted to do and was responsible to the plaintiff in error alone for the manner of performance of his duties and the stevedore had no control over the winchman in the true sense of the term. And there is this further element in the case, that the contention of the plaintiff in error would make A. liable for the acts of the general servant of B. where A. has no voice in the selection of the servant and no power to discharge or replace him as to the particular employment if he prove unsatisfactory, or to enforce obedience.

The earliest English case in which this principle is discussed appears to be the case of Laugher v.

Pointer, Kings Bench (1826), 5 B. & C., 547. In that case the defendant was the owner of a coach and was furnished horses and a driver by a liveryman. It was sought to charge the defendant for the negligence of the driver in the management of the horses while engaged in driving the defendant. The judges of the court were equally divided upon the question of the defendant's liability. Bayley J., in his opinion, said:

> "Upon the case now before the court, the hirer makes no contract with the coachman; he does not select him; he has no privity with him; he usually gives him a gratuity, but he is not by law obliged to give him anything; and from thence I conclude that the coachman is not the servant of the hirer. And if the coachman is not the servant of the hirer, on such an occasion, but is chosen and entrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses. If the coachman is in such a case the servant of the hirer, he may, at any moment, require him to quit the charge of the horses, and deliver them over to another, and must be obeyed; but I think it cannot be said that the coachman may not lawfully refuse, and ought not in most cases to do so."

In the case of Quarman v. Burnett, 6 M. & W., 499, the same question again arose and it became necessary for the court to pass upon the point. It was then held that the hirer was not liable for the negligence of the driver. Baron Parke, in rendering the opinion of the court, said:

> "Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for his misconduct, and whose orders he was bound to receive and obey. . . . But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; and consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position."

In Murray v. Currie (1870), L. R., 6 C. P., 24, which case is cited and relied upon in the brief of the plaintiff in error, the testimony of the stevedore, Kennedy, was:

> "That the ship owner selected those of the crew who were employed in unloading, but

> he (Kennedy) selected the work for them, and had control over it; and that he could have refused to employ Davis or any man he thought incompetent."

Bovill, C. J., said:

> "He (the stevedore) had entire control of the work, and employed such persons as he thought proper to act under him. He had the option of using the services of the crew of the ship; but he was under no obligation to do so."

And by Miller, J.:

> "The defendant (the general master) could not have taken him away from his work."

In the case of Rourke v. White Moss Colliery Co. (1876), 2 C. P. Div., 205, a case largely relied upon by the plaintiff in error, it seems apparent from the opinion of the court that the judges regarded the engine and engineer as entirely at Whittle's disposal and that Whittle had the same control over the engineer as over his own men. In the words of Cockburn, C. J.:

> "It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal just as much as if they had lent both to him."

The case is cited as one in which the particular employer had the right of discharge and substitution by the learned authors of Shearman & Redfield on Negligence (5th Ed.), Vol. 1, p. 245, note

4, and appears to have been considered in that light in the subsequent case of Donovan v. Laing, etc., Construction Syndicate (1893), 1 Q. B., 629, a case which is also largely relied upon by the plaintiff in error. In this case, Lord Esher, in speaking of the power of Jones & Co. over the craneman, said:

> "If they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment."

Lord Bowen also, in his opinion (p. 634), expressly distinguishes the case from the cases of Laugher v. Pointer, and Quarman v. Burnett, on the ground of the right to discharge. On this point he said as follows:

> "If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the one he is driving; and if the coachman acts wrongly the hirer can only complain to the owner of the carriage."

Here is an express recognition of the necessity to the decision of the right to discharge or substitute.

In the case of Jones v. Mayor, etc., XIV., Q. B. D., 890, the defendant who owned a street sprinkler hired a horse and driver to drive it and designated the street upon which the sprinkling was to be done. The court followed the case of Quarman v. Burnett and distinguished the case of

Rourke v. White Moss Colliery Co., and held that the hirer was not liable for the negligence of the driver.

In considering the English decisions, it is to be borne in mind that prior to the decision of the House of Lords in the case of Johnson v. Lindsay (1891), A. C., 371, reversing the Court of Appeals (23 Q. B. D., 508), it had been held by the lower English courts that it was not necessary to the defense of common employment that the plaintiff should be in the employment of the master whose servant's negligence caused him injury. The employees of sub-contractors were held fellow servants with the employees of the contractor. The House of Lords, however, held that in order to make this defense of common employment valuable there must not only be common employment but common employment under the master whose servant is guilty of negligence.

In Cameron v. Mystrom (1893), A. C., 308 (Privy Council), the stevedore sought to shield himself from liability for negligent injury to a member of the ship's crew by interposing the defense that his servants were fellow servants with the ship's crew. The Lord Chancellor, in giving the opinion of the Privy Council, said:

> "The relation of stevedore to ship owner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedore so completely under the control and at the disposition of the master as to make them the servants of the ship owner, who neither pays them, nor

> selects them, nor could discharge them, nor stands in any other relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work."

In Union Steamship Co. v. Claridge (1894), A. C., 185, the Privy Council distinguished Rourke v. White Moss Colliery Company and held that upon the particular contract involved in that case and the practice under it, the winchman of the ship was not a fellow servant with the employees of the stevedore. At page 186 of the report, it is stated, however, that the wording of the contract in the case was very similar to the contract in the Rourke case.

The case of Jones v. Scullard (1898), 2 Q. B., 565, cited in the brief of the plaintiff in error, was a case in which a livery stableman furnished the owner of a horse, harness and hansom with a driver. Prior to the accident, the driver had been driving the hirer, who was the defendant in the action, for six weeks exclusively and the defendant had furnished the driver with his livery.

Lord Russell, at the opening of his opinion, expressed great hesitation in deciding the case. He quoted the following from the opinion of Abbott, C. J., in Laugher v. Pointer:

> "Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice of the coachman."

And added the comment:

> "That, I think is an observation pregnant with good sense."

He distinguished the cases of Laugher v. Pointer, and Quarman v. Burnett, from the case of Rourke v. White Moss Colliery Company and Donovan v. Laing, etc., Construction Syndicate, on the ground of the completeness of the control and quoted the portion of Lord Justice Bowen's opinion in the Laing case hereinbefore given, and laid special emphasis upon the length of time the driver had driven the defendant as bearing upon the selection of the driver by the defendant. In speaking of the carriage cases above cited, he said:

> "He (the hirer) could not order him (the driver) to increase his speed, for the driver might lawfully refuse to do so on the ground that he was acting under his master's orders in driving slowly. But where the hirer of the horse is himself the owner of the horse, he is entitled to dictate to the driver as to how fast he shall drive and the driver is bound to take his orders from him."

It is clear that the defendant's control of the driver in this case was complete. There can be no question as to the defendant's right to discharge the driver from his employ and to substitute any person he pleased in the driving of his own horse and carriage. The absence of any right on his part to discharge the driver from the liveryman's employ had nothing to do with the case nor has it any relevancy to the case at bar. The question in the case at bar is as to the power of substitution in the particular employment and not in the general employment.

The Canadian case of Hastings v. Le Roy, No. 2, 34 Can. Sup. Ct., 177, is not an authority for the contention of the plaintiff in error herein. In that case, the defendants who were owners of a mine, in order to avoid labor troubles, had gone through the form of letting a contract to sink a winze. They, however, paid the employees of the contractor and fixed their wages and retained the right under the contract to approve the employment of the workmen and to have them discharged upon request. Defendant also directed the work to be done. Under these circumstances, the Court treated the so-called contract as a mere cover and held that the employees of the contractor or the so-called contractors were really servants of the owners.

In the case of St. John Gas Light Co. v. Hatfield, XXIII Can. Sup. Ct. Rep., 164, decided by the same court, the defendant, a gas company, engaged in laying a main in a public street, being short of men, procured from a plumber the services of the plaintiff to assist in connecting the main with pipes leading to houses and street lights. The plaintiff was injured by the negligence of one of the defendant's servants. It was urged that the plaintiff was a fellow servant with defendant's employees, but the Court refused to set aside a verdict of the jury. The Court said, in its opinion:

> "The plaintiff in doing the work which he did acted as the servant of Wisdom, and was paid by him as his hired servant at $7.00 per week. The defendants not only never hired the plaintiff or agreed to pay him for his services, but he was in no sense under the control of the defendants, nor under their directions, save in so far that they

> pointed out the places where the connections were to be made."

In this case the leading English cases were cited and discussed by counsel.

It is submitted that the Canadian cases furnish no support for the contention of the plaintiff in error.

The case of The Elton, 142 Fed. Rep., 367, is the case, however, most largely relied upon by the plaintiff in error. That case is distinguishable from the one at bar in several important particulars—first, as to the contract under which the work was being done. In that case, the charter-party provided that the ship was to furnish to the consignees or those engaged in the operation of discharging the cargo, the ship's winches, together with the steam and men necessary to operate the same.

In the case at bar, the contract of employment as testified to by Terrence, the contracting stevedore for the loading of the ship, was as follows (p. 13):

> "It is the customary thing to pay a dollar and a half a thousand for hoisting; they send you a bill and you send them a check. That is all the arrangement I ever had. I conformed to the custom in this case, and paid the Standard Oil Company $1.50 a thousand for hoisting."

It is submitted that there is a vital distinction

between a contract to furnish men, winches and steam to some one to do work with and a contract to do the "hoisting." This distinction is further borne out by the testimony in the two cases.

In The Elton, the Court, in its opinion, per Gray, J., says:

> "During the active operation of unloading there can be no question on the evidence that the winchman was as much under the direction and control of the stevedore as were any of the men employed by him. The winchman turned on the steam, lowered, hoisted and stopped by direction of the stevedore. The captain and mate both testify that the officers of the ship had no direction or control of him in the actual work of unloading, and that he could have at any time been removed from that work and another put in his place by the stevedore."

It is admitted in the case at bar that the stevedore could not have used the winch nor could he have relieved the winchman and set one of his own men to operate the winch. He did not even have access to the winch-house.

It is submitted that there is a distinction here between the two cases, upon which distinction the case at bar might well be sustained, even though it were held that the case of The Elton were correctly decided.

The cases of Murray v. Currie, Rourke v. White Moss Colliery Co., Donovan v. Laing, relied upon by the Court in The Elton have already in some measure been discussed. The Court also cites in that case the following cases:

The Joseph John, 30 C. C. A., 199.

Wyllie v. Palmer, 137 N. Y., 248.
Kimball v. Cushman, 103 Mass., 194.
Clapp v. Kemp, 122 Mass., 481.

In the case of The Joseph John, the charter party provided that the stevedore was to be employed under the direction of the master. The reasoning of the Court, however, is not confined to that state of facts and the Court found the libellant, winchman, employees on the barge and the stevedore's employees all negligent.

In Wyllie v. Palmer, 137 N. Y., 248, a firm of manufacturers of fire works sold a bill of goods to a committee and at the express request of the committee sent along a man and a boy at the committee's expense to set off the fire works under the direction of the committee. The boy, who was not furnished by the manufacturers to set off the fire works but merely to assist the man, was directed by a member of the committee to set off a rocket and for the negligence of the boy in the execution of this command the Court held that the committee and not the boy's general master, was liable. See the summary of this case in Murray v. Dwight, 161 N. Y., 301, at p. 307. Clearly in that case the committee could have relieved the man and the boy from the work and have substituted anybody else they pleased to set off the fire works and could have directed them to set off the fire works in any manner the committee desired.

In the case of Kimball v. Cushman, 103 Mass., 194, the defendant was the owner of the horse that was being ridden at the time of the accident. The rider was employed by his brother who was hired by the defendant to stable the horse, and the rider was, at the time of the accident, on the defendant's business. The Court said:

> "The fact that there is an intermediate party, in whose general employment the person, whose acts are in question, does not prevent the principal from being held liable for the negligent conduct of the subagent or the under servant, unless the relation of such intermediate party to the subject matter of the business in which the under servant is engaged, be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor. In this case, there was no contract with Joseph Flanders such as would exclude the defendant from control of and responsibility for the acts of Charles H. Flanders (the rider), in the service upon which the latter was engaged."

The case of Clapp v. Kemp, 122 Mass., 481, supra, was the case of a pedestrian who fell into a coal-hole in the sidewalk connected with the defendant's store by reason of the negligence of the driver of a coal cart making a delivery in removing the coal cover and not properly guarding the same.

It is submitted that so far as this case proceeded upon the theory that the driver of the coal-cart was an agent of the person to whom the delivery was being made, it cannot be sustained, but it must rather rest upon the non-delegable duty to the public of the abutting owner who maintains in the street a coal-hole for his own convenience.

Of all of the cases, therefore, relied upon in The Elton, the only ones in which the opinions do not expressly state that the power of rejection and substitution on the part of the particular employer existed are those of Rourke v. White Moss Colliery

Co., and The Joseph John, and it is believed that at least in the former of those two the Court regarded the power as existing.

It would not be instructive to review all of the cases cited in the brief of the plaintiff in error because in nearly all of them the control of the particular employer was complete, including the power of discharge and substitution.

There can be no doubt as to the standing of the plaintiff in error upon the facts of this case before the Courts of the State of New York.

The plaintiff in error was held liable for the negligence of its winchman in a case precisely similar to this one in Sanford v. Standard Oil Co., 118 N. Y., 571. This case was cited and followed by the Court of Appeals in the case of Johnson v. Netherlands, etc., Nav. Co., 132 N. Y., 576, and it was again applied to this plaintiff in error by the Appellate Division of the Second Department in the cases of De Maio v. Standard Oil Co., 68 App. Div., 167, and Lauro v. Standard Oil Co., 74 App. Div., 4.

In the De Maio case, the Court said:

> "The liability of the defendant corporation under the facts proved was recognized in Sanford v. Standard Oil Co. (118 N. Y., 571)."

In the Lauro case, the trial court submitted to the jury the question as to whether the winchman was the servant of the stevedore or of the plaintiff

in error. The Appellate Division, in reversing a verdict for the defendant, said, per Hirschberg, J.:

> "That the drum man was in the service of the defendant at the time of the accident and was furnished by it to do the specific work in which he was then engaged was not disputed. It was alleged in the complaint, admitted in the answer, and testified to by both the drum man and his employer. As a matter of law he was, therefore, not a fellow servant of the stevedore or of the latter's employees, and the defendant was liable to them for injuries resulting from his negligence without their fault."

The Court then stated that the precise question had been twice decided in the Court of Appeals and proceeded to review the cases of Sanford v. Standard Oil, supra, and Johnson v. Netherlands American Steam Nav. Co., supra.

The Lauro case was again cited and followed by the same Court in Ford v. Arbuckle, 107 N. Y. App. Div., 221.

These decisions of the Second Department are all more recent than Baldwin v. Abraham, 57 N. Y. App. Div., 67, cited by the plaintiff in error, and are decisions of the same Court. It appears, therefore, that that Court did not regard the principle enunciated in Baldwin v. Abraham as applicable to a case like the one at bar.

In Johnson v. Netherlands American Steam Nav. Co., 132 N. Y., 576, the Court of Appeals said:

> "The question is as to whether the winchman was the servant of Lithman, and consequently the co-servant of the plaintiff. Lith-

> man testified that he was paid by the ton; that the vessel furnished the steam power and a winch driver. This is the evidence as to the contract with the defendant. It does not appear that he had the power to order, direct, discharge or control the winch driver farther than to signal to him by way of the gangwayman when to hoist or lower, go ahead or come back. It consequently does not appear to us that the winchman could be regarded as the servant of Lithman. It is quite apparent that it was the intention of the defendant to retain charge of the steam power and winch and operate it through its own servants and employees. And the fact that the winchman received orders from the plaintiff when to hoist and when to lower, under the circumstances of this case, does not operate to change his relations to the defendant as its servant."

The case of Quinn v. National Sugar Refining Co., 102 N. Y. App. Div., 47, cited by the plaintiff in error, was decided by the same Court that had decided the Mayo and Lauro cases, supra, against the plaintiff in error, and subsequently decided the case of Ford v. Arbuckle, 107 N. Y. App. Div., 221, citing the Mayo and Lauro cases and following them. It cannot be assumed that the Court in deciding the Quinn case intended to enunciate a different principle from that of the other three, as no attempt was made at distinction in the opinion. Evidently the Court in the Quinn case regarded the winchman and the winch as having been placed entirely at the disposal of the lighterage company and that, therefore, that case did not fall within the principle of the others.

In the case of Murray v. Dwight, 161 N. Y., 301 (from the dissenting opinion in which the plaintiff in error quotes in his brief), the plaintiff was the servant of a truckman and was sent by his master with a horse to hoist at the defendant's warehouse. A block belonging to the hoisting apparatus being rigged by the warehouseman's servant, fell on the plaintiff. The Court said that the plaintiff was no more a fellow servant of the warehouseman's employees than if he had taken the goods on his truck to transport. The Court said, in part (pp. 304, 305, 306):

> "The question when and under what circumstances the servant of the general master becomes the servant of another is often difficult of solution. There is some apparent conflict in the authorities, due more to the difficulty of applying the legal principle to ever varying facts than to any discord with respect to the principle itself. . . . . The mere fact that one person renders some service to another for compensation, expressed or implied, does not necessarily create the legal relation of master and servant. There are many kinds of employment which are peculiar and special, where one person may render service to another without becoming his servant in the legal sense. A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling. The truckman who transports the traveler's baggage or the merchant's goods to the railroad station, though hired and paid for the service by the owner of the baggage or the goods, is not the servant of the person who thus em-

ploys him. He is exercising an independent and quasi-public employment in the nature of a common carrier, and his customers, whether few or many, are not generally responsible for his negligent or wrongful acts, as they may be for those of other persons in their regular employment as servants. A contract, whether express or implied, under which such special jobs are done or such special services rendered, is not that of master and servant within the law of negligence. . . . The employment in its scope and character was in no respect essentially different from that which every truckman enters into with his numerous customers in the course of a day as a carrier of baggage or goods. The fact that the plaintiff detached the truck and performed the job with a horse alone did not change the character of the employment, nor the legal relation that exists between an ordinary truckman and his customers. The goods were moved, it is true, not by the truck, but by another contrivance, and the plaintiff's duty was to manage and guide the horse, which was the real power behind the pulleys and tackle, as it would have been when hitched to the truck. In this capacity the plaintiff represented his general master, the truckman, and was all the time his servant, and did not become in any legal sense the servant of the defendant any more than he would if employed to move the goods to a railroad station on the truck, and if not such servant he could not, of course, have become the servant of the defendant's regular workmen."

The Court then proceeds to state and distinguish its previous decisions in the cases of Wyllie v. Palmer (supra), and Higgins v. W. U. T. Co., 156 N. Y., 75.

The plaintiff in error quotes from the opinion in this last-named case in its brief, but fails to state that in that case the elevator had not been turned over to the owners of the building and that it was still subject to the control of the contractor and that the contractor could, at any moment, have taken it out of the control of the owner and substituted his own operation.

In the case of Anderson v. Boyer, 156 N. Y., 93, it is apparent that the owners of the ship had nothing to do with the discharge of the cargo under their contract with the charterers, but so far as that work was concerned, the captain was not doing anything that the owners had any duty respecting and that the charterers could have employed anybody they saw fit to superintend the discharge of the cargo.

In the case of Kilroy v. Del. & Hudson Canal Co., 121 N. Y., 22, the ship was being unloaded by a stevedore employed by the consignees, but by custom the duty of managing and controlling the guy-rope was upon the captain. It was there held that in performing this duty or entrusting it to another he was deemed to be the servant and engaged in the business of the boat owner, not that of the stevedore; and that he and the plaintiff, who was one of the stevedore's employees, were not co-servants. The Court, per Finch, J., in distinguishing that case from the case of Murray v. Currie, supra, said (p. 30):

> "To make that case fit the one before us, we must first determine that the stevedore,

in unloading coal, was entirely independent of the captain, who had no right in any manner to interfere with the process of unloading; and then we must further find that he was employed by the stevedore as his servant to do his work. So that the case leaves us with our principal problem unsolved. The same difficulty prevents an application of the decision in The Harold, 21 Fed. Rep., 428."

Prior to the decision of The Elton, by the Circuit Court of Appeals of the Third Circuit, it seems to have been regarded as settled upon authority by the lower Federal Courts that the winchman furnished by the ship was not a fellow servant of the employees of the stevedore.

The case of The Harold, 21 Fed. Rep., 428, cited by the plaintiff in error, was one in which the stevedore did not do the work by independent contract. His men were paid by the day by the ship.

The facts in the case of Lonergan v. The Island, 28 Fed. Rep., 478, cited by the plaintiff in error, also render that case inapplicable to the one at bar.

In th case of The Victoria, 69 Fed. Rep., 160, Benedict, D. J., held, as indicated in the brief of the plaintiff in error, that the stevedore and the winchman furnished by the ship were not fellow servants.

In the case of The Lisnacrieve, 87 Fed. Rep., 570, Thomas, D. J., held to the same effect in a carefully reasoned opinion. This opinion also con-

tains a citation of the authorities upon both sides of the question.

The learned District Judge said in part (pp. 572, 573):

> "In any case, the ship did undertake to do a certain portion of the work of unloading. Such an undertaking is not merely loaning a servant to the stevedore. It is a co-operation on the part of the ship in the work of unloading the cargo, precisely to the same extent as if two independent stevedores had contracted for a division of labor in discharging the cargo, one furnishing the tackle and hoisting power, and the other furnishing men and appliances for the remainder of the work. It does not change this relation that the winchman was to run his winch, or to stop his winch, or graduate the speed thereof, as the stevedore's servant signaled him to do. Independent contractors and their servants are often called upon to direct and advise each other in movements and acts relating to the common work, and such often is the case between the contractor and the person with whom the contract is made. The fact that the servant of one of the parties regulates his acts by the actions of the servants of the other does not make them co-servants. In the present case the winchman was a general servant of the ship. He was put in charge of the ship's machinery, to perform a duty that the ship had assumed the duty of performing. He went to his post of duty, or left the same, by no command of the stevedore, but simply because his master or his delegated agent so directed him. True, the stevedore gave him a signal, and it was his

duty to obey it; but this duty sprang from no contract of hiring made by the winchman with the stevedore, but purely or wholly from the relation of master and servant that existed between the winchman and the ship owners. When the stevedore signaled him to hoist, he was at perfect liberty to disobey this order, so far as the stevedore was concerned, and the stevedore was helpless. Nay, if the stevedore had signaled him to hoist, and his master had directed him not to hoist, is there any doubt to whom he owed and would have rendered obedience? There is no lending of a servant or subhiring of a servant in this case. The master, in effect, said to his servant: 'I have undertaken to furnish the power and operators of the power to hoist the cargo from the hold. The stevedore is engaged to do the remaining work. You will take charge of the winch and operate it, co-operating, by means of signals, with the stevedore's servants.' The stevedore had not selected the winchman. The ship owners chose him. The stevedore was obliged to take him or no one. The ship alone had knowledge of his competency; had alone investigated or tested it. The ship placed or retained him in charge of the winch. The stevedore could not send him to or from it. The stevedore did not pay him, and could not discharge him. . . . In fact, he had no power over him whatever, except through the will and direction of the owners of the ship."

The foregoing quotation at length has been made herein because of the great learning of the judge who wrote the opinion in matters pertaining to the

law of negligence and because of the forcible reasoning therein contained and the applicability of the reasoning to the case at bar. If the foregoing is true of a case where the winchman was furnished to the stevedore under charter party or under the contract as to the discharge of the cargo, how much more applicable it is to a situation like the case at bar, where the contract was to do the "hoisting" and where the winch and winchman were located in a house upon the dock owned by the plaintiff in error, to which the stevedore and his employees did not even have access.

A similar state of facts was again passed upon by the same judge in the case of "The Slingsby," 116 Fed. Rep., 227, in which case an appeal was taken to the Circuit Court of Appeals of the Second Circuit, and the ruling of Judge Thomas in this case and in the "Lisnacrieve" was approved in a carefully considered opinion (120 Fed. Rep., 750) reviewing the English and American cases which counsel had urged upon the Court as holding to the contrary. These cases are the same in the main as the ones considered by the Circuit Court of Appeals of the Third Circuit in The Elton and upon which the latter Court reached a contrary conclusion.

The Court, at page 750, said:

> "It is well settled that A. and B. may by their respective servants undertake the doing of some particular work, each selecting and paying his own servants, and retaining the right to discharge them from service for proper cause. In such case each servant remains in law the servant of his particular employer, and the circumstance that they all work at the same time, and that the orders

> which direct the joint application of their individual energies are given by some one foreman or overseer or director, does not change their legal relations. The servants of A. do not become fellow servants of B. So, too, it is equally well settled that A. may lend or hire his servants to B., to be employed either in B.'s work, or in A.'s putting them so entirely at B.'s disposal that they become pro hac vice B.'s servants and fellow servants with all others in B.'s employ. Within which category a particular case is to be grouped depends upon its own peculiar facts."

The Court thereupon proceeded to examine the facts in that case, and observed, among other things, that if dissatisfied with the way in which he did the work, the stevedore might complain to the captain, who would then make a change, if he saw fit to do so, and that however well pleased the stevedore might be with the work of any winchman, however desirous he might be to retain the services of the winchman, nevertheless the captain could have removed him and substituted another; that the stevedore could not remove him, nor, if he left the winch, could he send any of his own men to run the winch.

The Court then said (p. 751):

> "Of all the tests which have been suggested, and the authorities are far from uniform, it would seem that this, the power of substitution of one man for another, is the most satisfactory. It may not in all cases be as apparent as it is in this one that B. has no power to remove or differently employ the

> individual whom A. has selected and assigned to a special line of work, but when it does, the amount of control which B. exercises over the individual is surely insufficient to establish, even pro hac vice, the relation of master and servant."

In the case of The Gladestry, 128 Fed. Rep., 591, the same question again arose before the same Court, and the Court held that the case was controlled by its decision in The Slingsby.

The decisions in The Lisnacrieve, supra, and The Slingsby, supra, were cited with approval and followed by the Circuit Court of Appeals of the Sixth Circuit in the case of Otis Steel Company v. Wingle, 152 Fed. Rep., 914. In that case the plaintiff was the servant of an independent contractor who had a contract with the defendant for hauling certain steel plates from defendant's mill. The plates were loaded on wagons of the contractor by the defendant by means of two movable cranes. It was the duty of the defendant to place the plates upon the wagon in the position indicated by the driver. As the plaintiff was standing near the driver and directing the operators of the cranes where to place a certain plate, he was injured by the negligence of the operator of one of the cranes in placing the plate upon the wagon. It was contended on behalf of the defendant that in respect to the particular transaction of loading the wagon, the plaintiff and the servant of the defendant became fellow servants. The Court said in part (p. 916):

> "In obeying the signal to move forward, the operator was acting only as the general servant of the Otis Company. The duty to comply was a duty imposed by his contract

> of general hiring, and not by reason of any authority the driver had or any which he could enforce. The Otis Company undertook to move the plates into proper position for carriage, and it was its duty to obey the signals of the driver indicating when the plates were in proper position on the wagon. The circumstances of the case bring it quite within the principles applied in The Lisnacrieve (D. C.), 87 Fed., 570; McGough v. Ropner (D. C.), 87 Fed. 534, and The Slingsby, 120 Fed., 748, 57 C. C. A., 52, where stevedores were injured by the negligence of a servant of the ship in operating a winch, although the winchman operated the winch by direction or signal from the stevedore. The carriage cases of Quarman v. Burnett, 6 M. & W., 499; Jones v. Liverpool, 14 Q. B. D., 890, and Little v. Hackett, 116 U. S., 366, are also in point. In those cases it was held that one who hires a hack or cab with its driver is not responsible for the driver's acts of negligence, where he assumes no further control than to tell him where to drive, or stop, or start."

In the case of Little v. Hackett, 116 U. S., 366, this Court held that a person who hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special direction as to his mode or manner of driving, is not responsible for the negligent acts of the driver. This Court in that case cited with approval Quarman v. Burnett, supra; Jones v. Corporation of Liverpool, 14 Q. B. D., 890,

supra, and disapproved of Thorogood v. Bryan, 8 C. B., 114. It was there said, page 380:

> "Unless he did exercise such control and require the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him."

In the case of The Clarita, 23 Wall., 1, it was held by this Court that the owners of a ship in tow are not responsible for the negligence of those operating the tugboat. See to the same effect Sproule v. Hemingway, 14 Pickering, 1, where Shaw, C. J., lays particular emphasis on the fact that the owners of the vessel in tow have no power of selection or discharge over those operating the tug. See also to the same effect Dalyell v. Tyrer (1858), El. Bl. & El., 899, where the power of hiring and discharging was also emphasized.

The cases in which this Court has held that in an action at common law the ship owner is not liable for injuries inflicted exclusively by the negligence of a pilot accepted by a vessel compulsorily, also serve to illustrate the underlying principle of the doctrine of respondeat superior.

In the case of Homer Ramsdell Company v. Comp. Gen. Trans., 182 U. S., 406, 412, this Court speaks with approval of the ruling of Dr. Lushington in The Maria (1839), 1 W. Rob., 95, 106. Dr. Lushington there stated the principle underlying his decision, as follows:

> "Upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another,

> the principle upon which liability depends wholly fails."

This Court in that case also quotes from the opinion of the Judicial Committee of the Privy Council in The Halley (1868), L. R. 2 P. C., 193, 201, as follows:

> "And that this law (the common law of England) holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders, which he is bound to obey."

In conclusion, it may not be improper to quote the opinion of certain text-book writers of recognized learning and ability upon the point herein involved.

It is stated in 1 Thomp. Neg. (2nd ed.), Section 579:

> "The right to control the conduct of another implies the power to discharge him from the service or employment for disobedience; and, accordingly, the power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists."

And in Vol. 4 of the same work, Section 5185, it is stated:

> "A stevedore is understood to be an independent contractor who takes the job of loading or unloading a vessel. Plainly, a winchman on the ship or on the wharf, employed and furnished by the owner of the ship, is not a fellow servant either of the stevedore

himself or of a laborer, or of a longshoreman employed by the stevedore, because they are servants of different masters."

The following is quoted from Vol. 1, Section 162 of Shearman & Redfield on Neg. (5th ed.):

> "The hirer cannot properly be said to have control of the servants, unless he has the right to discharge them and employ others in their places in case of their misconduct or incapacity; that being the only practicable means by which free servants can be controlled. If, therefore, the hirer has no such power, he is not responsible to any one for the faults of the servants. If the hirer is vested for the time with exclusive control, with the right to discharge the servants and to employ others, he alone is responsible for their defaults (citing O'Rourke v. White Moss Colliery Co., supra; Murray v. Currie, supra, and other cases). Where a person hires the personal property of another, who supplies, under the contract, a servant charged with the general management and control of the property, although the hirer acquires, to a limited degree, a dominion over the servant, with a right to superintend and direct his conduct, the latter still continues the servant of the owner, who is responsible for his negligence, though it occurs in the performance of work in which the hirer alone is interested."

It is respectfully submitted that the foregoing cases and the history of the doctrine of respondeat superior show that the power of selection and dis-

charge in the particular employment is an essential element in that doctrine; and that upon the facts of this case the winchman, whose negligence caused the injuries of the defendant in error, in the operation of the winch, was the servant of the plaintiff in error and engaged in its service and was not under the direction and control of the stevedore in a sense such as to make the stevedore responsible for the winchman's acts in the operation of the winch and to render the winchman a fellow servant with the defendant in error.

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